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**THE BANKING CRISIS AND CULTURAL RESOURCES:
THE ROLE OF THE RTC AND FDIC
WHEN LIQUIDATING HISTORIC PROPERTIES**

Joshua J. Bloom

A THESIS

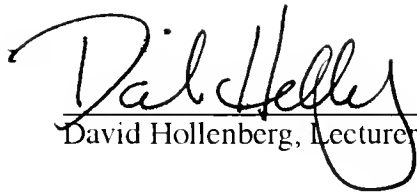
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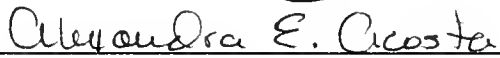
Presented to the faculties of the
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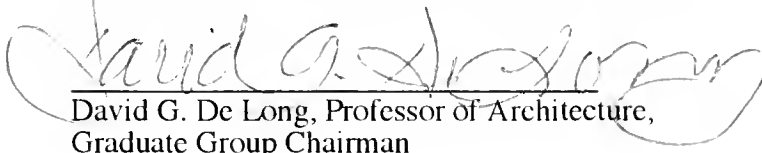
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PREFACE

This thesis is the exception to many of the rules which typify a thesis in historic preservation. It is about an event (the disposition of billions of dollars of property acquired by federal agencies from failed banks) so timely it has not yet been completed. Therefore, this thesis is clearly not the last word on its subject; I only hope it makes an attempt at the first word.

Theses in historic preservation usually rely on a mix of primary and secondary printed materials, some of them so old and physically deteriorated they disintegrate as one pulls them from a library shelf. The sources for this thesis are often primary, and in many cases raw--that is, they do not share the benefits of critical analysis which comes with time. General circulation magazines and journals provide most of the reflective material that exists; database printouts and internal RTC directives and memoranda, supplemented by interviews, supply the larger share of sources. Because there has been very little prior analysis, the subject by nature requires that the writer occasionally take a policy position. At all times the discussion seeks to balance the real needs on several sides--those of preservationists, government agencies, bankers, and taxpayers--and not take the position of a preservation ideologue.

The general issue of disposition of federally owned assets containing culturally significant resources has ample precedent and will recur. In that sense, this discussion may not be a relic before it is even completed. The unique circumstances which surround the properties at issue here are the ways in which they were acquired and the air of crisis which surrounds their disposition. The policy dilemma, however, is sure to appear again, in other forms, many times.

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LIST OF ABBREVIATIONS

ACHP	Advisory Council on Historic Preservation
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act (also, “the Superfund Law”)
DOD	Department of Defense
EIS	Environmental Impact Statement
E.O.	Executive Order
ESA	Endangered Species Act of 1973
ESA	Environmental Site Assessment
F&WS	U.S. Fish and Wildlife Service
FDIC	Federal Deposit Insurance Corporation
FIRREA	Financial Institutions Reform, Recovery and Enforcement Act of 1989
FSLIC	Federal Savings and Loan Insurance Corporation
GSA	General Services Administration
HUD	Department of Housing and Urban Development
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act of 1969
NHPA	National Historic Preservation Act, as amended
NTHP	National Trust for Historic Preservation
RTC	Resolution Trust Corporation
S&L	Savings and Loan (also, “thrift”)
SDWA	Safe Drinking Water Act
SHPO	State Historic Preservation Office

Chapter 1

The fortuitous event: How the federal government came to own so much real estate

The banking crisis of the late 1980s caused the federal government of the United States to inherit tens of thousands of properties worth many billions of dollars. Even before the banking crisis, the federal government was already the largest landowner in the country. But this new portfolio, received from failed savings and loans and commercial banks, was different from other government properties--different by virtue of the portfolio's size, diversity of contents, and nature of acquisition. The portfolio was not acquired intentionally or with any intended use; it was to be disposed--all of it--into private hands as quickly as reasonably possible. In accepting these properties, designated agencies of the federal government were to act as liquidators for banks in receivership. The assets had been privately owned and the government intended to return them to private ownership.

Among the extensive and diverse holdings are some properties which contain culturally significant features such as historic structures, buildings, and landscapes. The total number of such cultural resources will never be definitively known; an unknown number were sold before an identification process existed and current policies and procedures to identify and protect cultural resources cannot meet the task's magnitude. The discussion which follows attempts, in part, to identify the magnitude of the issue, for the scale of the problem, in part, dictates the parameters of proposed solutions.

The acquisition of these assets was as unforeseen as the failures of the thrifts and banks themselves. Unlike most other federally owned properties, such as a military base or a postal service delivery truck, these assets were not deliberately acquired for a specific use. Additionally, the events which precipitated the acquisitions (the insolvencies of large numbers of financial institutions) posed great risks to the stability of all United

States markets. While the government has policies and procedures for deaccessioning properties of all types when the assets are deemed obsolete or superfluous, it had few policies for dealing with this unanticipated windfall. The nature of the crisis and size of the inventory necessitated the creation of a new agency.

The government's entanglement in the sale of failed bank and thrift assets can be traced to the beginnings of depositor's insurance. The federal government's history of protecting deposits in private institutions began in 1933 when, as a result of the bank failures of the Great Depression, new legislation created the Federal Deposit Insurance Corporation (FDIC). Although the crisis of the 1980s was not the first time the FDIC was called upon to rescue a failed bank, compensate depositors, and liquidate assets, the government had never encountered failures on such a large scale. In the midst of such a vast and pervasive banking and S&L crisis, developing policies to deal with disposition of culturally significant resources was perhaps the farthest issue from anyone's mind.¹

From a cultural resource perspective, most properties acquired were unremarkable. The volume of properties, however, was extraordinary. Agencies of the federal government came to own thousands of houses, condominiums, office buildings, and shopping centers. But they acquired more unusual assets as well: resorts, hotels, golf courses, yachts, undeveloped land, uranium mines, ranches, coin collections, works of art, and historic buildings among them--anything that might have been offered as collateral to secure a loan. Disposing of the assets was a monumental task; little attention was given to operating and maintaining each asset in the meantime.

¹ A note on terminology: The RTC uses the term "Special Resources" to refer to properties containing "natural, cultural, recreational, or scientific values of special significance." "Cultural Resource" generally refers to a National Register-eligible man-made building or site. "Natural resource" generally refers to lands containing environmentally sensitive features, habitats for endangered species, or features otherwise protected by the nation's environmental laws. In this thesis, "preservation" is always used in the context of cultural resources and refers to historic preservation of significant architectural, archaeological, or other man-made sites. Where "conservation" is used, it refers specifically to protection of natural resources and environmentally sensitive lands.

Answering the question “How many cultural resources are at issue?” depends on several factors, including one so simple as “What defines an institution’s financial solvency?” Standards defining solvency have changed, even since the RTC’s inception, thus affecting the number of banks and thrifts which enter receivership.² In fact, receivership by the RTC or FDIC is one of several reorganization options which may be pursued when an institution becomes unsound: Small banks or thrifts may be saved from bankruptcy if they are purchased by another corporation or absorbed by larger institutions. The fact is, not all properties of insolvent banks or savings and loans end up in federal hands for liquidation.

In other words, these moving thresholds mean that a greater total number institutions could have failed if the standards defining solvency had not changed, which would have placed more assets (and, presumably, more cultural resources) in federal control. Similarly, the reorganization options for unsound institutions affects the number of them which enter receivership and RTC or FDIC control. The gray area between sound and unsound, between private and government control, is vast. The total number of properties affected by these policy changes and reorganization decisions is unknowable.

This thesis will not concern itself with estimating the number of potentially historic properties which escaped any assessment at all, although this is an important issue, nor will it (nor could it) estimate how many historic resources are in the net. As a result of a banking and S&L crisis, the federal government (which, through the National Historic Preservation Act of 1966, has an obligation to protect historic resources) came to own some historic properties that previously had been in private hands. This thesis will discuss the policies and procedures by which those historic properties are being

²“Savings and loan,” “S&L,” and “thrift” refer to institutions which, historically, financed primarily individual mortgages on single-family homes. These practices changed in the 1980s when many S&Ls took greater risks by entering the speculative real estate development arena. “Bank” refers to financial institutions which lend primarily to commercial borrowers. The term “bank” is sometimes used less specifically (though not in this thesis) to include all types of financial institutions.

transferred back to private ownership. The legislated thresholds which defined the failure of some financial institutions and not others is beyond the realm of this discussion.

The RTC's holdings are not evenly distributed across the United States and the inventory is constantly changing. The distribution reflects the geographical distribution of the failed institutions and shows high concentrations where speculation and development were at their peak. The vast majority were in Texas and the Southwest. As the following tables illustrate, as of December, 1990, the most prevalent type of property owned by the RTC was the single-family home and, of all types of properties, Texas had the most.³

Table 1: Four Categories of RTC-Owned Property

Land	10,622 parcels
Single-Family Homes	13,504 units
Multi-Family Prop's	12,465 projects
Commercial Properties	4,938 projects
Total Projects	41,529

Table 2: Number and Percentage of RTC-Owned Projects in Major Locations

<i>State</i>	<i>Number</i>	<i>%</i>
Texas	19,887	48
Louisiana	3,728	9
Arizona	3,113	7
Florida	2,342	6
Colorado	2,191	5
All other states	10,268	25

Note: Tables 1 and 2 are reprinted from Joseph J. Ori (see footnote). Source of data is credited to the RTC.

Still, the numbers are vague and incomplete. Prior to October, 1992, the RTC made no inventory with the intention of identifying so-called "special resources," a

³Joseph J. Ori, "Acquiring Structured Portfolios of Real Estate from the RTC," Real Estate Review, 49-50.

category which includes environmentally sensitive as well as culturally significant properties. (FDIC has never kept, and to date has no plans to establish, such a list.) Therefore, nothing is known about the nature of the properties sold by RTC from its inception in 1989 up to that point.

On October 27, 1992, RTC completed an inventory of all properties owned at that time; the inventory did not include property already deaccessioned. Over the next several months, the Advisory Council on Historic Preservation (ACHP) made assessments of historic buildings and archaeological sites on those properties.⁴ ACHP subcontracted with twenty State Historic Preservation Officers (SHPOs) to assist it. The assessments were far less stringent than Section 106 Review standards, and the assessments took precious months. By the time the screening process was completed, in those states where a diligent effort was made, up to one-third of the identified properties had already been sold.^{5,6}

The states and the Advisory Council analyzed the October, 1992, list using primarily an “educated guess” method. States were not required to keep substantial records of their reviews. In general, neither the Council nor the SHPOs had time or resources to visit the properties and so they relied on familiarity with their territory or calling on interested local groups. Four important states, each with large numbers of RTC-owned properties, were never systematically reviewed. In Arizona, California, New

⁴The Advisory Council on Historic Preservation is the federal agency created by the National Historic Preservation Act of 1966. It is responsible for implementing and enforcing the nation’s historic preservation laws. For a fuller discussion, see Chapter 4, “Protecting History.”

⁵Sharon Conway, Historic Preservation Specialist, Advisory Council on Historic Preservation, interview by author 13 December 1993, Washington, DC.

⁶“Identified” will be used to refer to properties which have been reviewed by the Advisory Council on Historic Preservation, or by a State Historic Preservation Officer, and found to contain a significant cultural resource. Identified properties are either listed on the National Register of Historic Places or believed to be eligible for listing. Identification does not confirm eligibility because time constraints usually do not allow sufficient research. ACHP and SHPOs try to use National Register eligibility standards as the threshold for “identification” when reviewing RTC- and FDIC-owned properties.

Jersey, and New Mexico, properties are only reviewed on an ad hoc basis when a suspected special resource is being sold.⁷

The total holdings of the RTC in October, 1992, were estimated at approximately 28,000 properties, unevenly dispersed among the states.⁸ A crude, first-cut inventory of special resources, performed by asset managers, “flagged” 7,903 (28%) of the properties as potentially containing cultural resources. ACHP either reviewed or subcontracted for the review of those properties. They fell into three categories:

Table 3: Numbers of RTC Properties Potentially Containing Cultural Resources, October 1992 (All 50 States)⁹

Undeveloped land greater than 1 acre*:	2,824
Land with structures greater than 50 years old:	1,156
<u>Land with structures of unidentified age:</u>	<u>3,923</u>
Total:	7,903

* Undeveloped land was flagged and assessed for potential archaeology.

Although RTC owned property in every state, the inventory indicated its dramatic dispersal. The following is a cross-section of total flagged properties by state (these numbers represent the sum of the three property categories shown in Table 3, by state):

Table 4: Numbers of RTC Properties Potentially Containing Cultural Resources, by State (October 1992)¹⁰

Alaska	4	New York	964
California	577	Ohio	79
Connecticut	136	Texas	2,206
Florida	897	Vermont	6
Kentucky	13	Washington State	9
Missouri	159		

⁷Conway.

⁸The number 28,000 represents a “best guess” of REO (real estate owned) at that time. It includes properties available for sale, in bankruptcy, under construction, or in litigation. Actual historical numbers are impossible to confirm; RTC maintains an active database, but historical data are typically quoted in terms of the dollar value of assets owned at a given time. In October, 1992, RTC held \$2.7 billion in assets and \$9.9 billion in receivables. The largest number of REO by the RTC at any one time was 42,000 properties in May, 1991.

⁹Jane Crisler, Historic Preservation Specialist, ACHP, telephone interview by author 6 April 1994.

¹⁰Ibid.

Of those assets, some states with a very large number of RTC-owned properties identified only a small number of culturally significant resources. Texas, with the greatest overall number of RTC properties, confirmed 5% of flagged properties to actually contain cultural resources.¹¹ New England states, examining a smaller inventory in a more densely built environment, identified and confirmed cultural resources in 35% of flagged properties.¹²

In absolute numbers, Texas examined 2,206 flagged properties in the first quarter following October, 1992. Of those, it confirmed (identified) only 17 (0.8%) as containing cultural resources. To expedite the review process, the Texas Historical Commission had deferred judgment on particular cases when it deemed it had insufficient information to make a ruling. Such properties got passed onto the list for the second quarter's review. That second quarter review, therefore, showed an anomalous percentage of identified cultural resources: 125 out of 1,089 (11%). On average, however, Texas identified cultural resources in approximately 5% of RTC properties initially flagged by asset managers.¹³

In addition to all the factors above mitigating the thoroughness of this first round of assessments, the basic list itself had systematic omissions. For example, the list did not include any unimproved land under one acre. Presumably, such land had no historic structures. But it may have had archaeological sites. Or it may be adjacent to an important resource. The number of such omissions was probably small, but even that cannot be known.

By the end of 1993, the ACHP had reviewed a total of 13,228 properties since the first screening began just over a year earlier. Of those, 783 properties were determined to

¹¹These numbers represent properties in Texas on which the presence of one or more culturally significant manmade resources was confirmed. Potentially, a property could contain multiple special resources of several kinds, including cultural and natural resources.

¹²Conway.

¹³Ibid.

have cultural significance, either by the Advisory Council or by a state historic preservation officer. In December, 1993, it was estimated that about ten properties containing a culturally significant resource of one kind or another were sold in the United States every day.¹⁴

The subject of this thesis cannot be frozen in time; it is a moving target. The lists of properties for sale and the policies and court rulings regulating their disposition change daily. In a year, the RTC will no longer exist. This thesis attempts to write a history in the middle of an event.

Although nothing in this story is static, the policy issues involved have bearing on all federally owned, culturally significant properties. This crisis, though large in magnitude, is not the last time a bank or thrift will fail in the United States. Even though it is probably too late to change the methods of operation of the Resolution Trust Corporation, the examination of its policies is no less worthwhile. The federal government will likely always be the largest land owner in the country, and it will always have assets for which it no longer has need. At some time, it will probably be called upon again to liquidate real estate which it acquired through some crisis. Some of those potential assets contribute in important ways to telling the story of America's past, understanding its present, and appreciating its culture.

¹⁴Ibid.

Chapter 2

How banks work and how banks fail: What led to the formation of the RTC

Before proceeding to the central discussion of disposition of failed commercial bank and S&L assets, it is valuable to look briefly at how the insolvencies occurred. The private banking and thrift industries operate within a balance of powers which includes market forces and federal regulation. But even federal regulators of banks and thrifts have historically enjoyed great independence from other branches of government. When one speaks of regulating disposition of assets, these relationships are key.

Banks and thrifts are corporations unlike any others and they have a unique privilege. They may borrow money (accept money for deposit), and lend it out for a fee. When the system works as intended, the institution makes a profit by borrowing at one rate (the interest rate it pays on deposits), and lending the money out at a higher rate. In doing this, a financial institution also provides the necessary mechanism to put money to productive use in an economy.

The U.S. Constitution permits both the states and the federal government to regulate banking. Consequently, a bank may be chartered as a national or state bank. All are served by the Federal Reserve Bank--the "bank for banks." Historically, when compared to other countries, the United States has always had a very large number of unit banks, each having a relatively small number of branches.

After the bank failures of the Great Depression, in order to regain the confidence of depositors, the federal government entered into a new relationship with the private banking industry. It would insure depositors against loss of their money. When depositors' insurance was created in 1933, two funds were established--one for commercial banks and the other for savings and loans. The funding mechanism was the same for each: banks pay an annual insurance premium based on their total deposits. The

FDIC was created as the new federal agency and corporation designated to administer both funds. The thrifts fund, dismantled in 1989, was known as the Federal Savings and Loan Insurance Corporation (FSLIC).

The premise of banking--accepting money to hold and lending it out at a profit--is, at its core, an extremely simple concept. However, these exchanges of money occur in an ever-changing world economy. No one understands all the underlying reasons behind world economic trends, but at the most basic level, the failure of large numbers of S&L's in the late 1980s was due to a flawed accounting system made worse by a bad economy: the thrifts--traditionally engaged primarily in the financing of single-family homes--lent short-term deposits as long-term loans.

The underlying causes of bank and thrift failures

L. William Seidman, chairman of the FDIC from 1985 to 1991, traces the banking crisis of the 1980s to the high inflation encountered by the early Ford administration. Attributed to the Arab states' tripling of the price of crude oil in 1974, the consumer price index rose by 11% that year. This fact notwithstanding, oil prices were but one contributing factor to an inflationary period. For the S&Ls especially, inflation meant trouble.

For years, thrifts had grown accustomed to the unsound practice of lending short-term investments (such as money in a passbook savings account) on a long-term basis (such as a 30-year home mortgage). This practice worked when they paid less to the depositor than they received from the mortgagor. In an inflationary period, however, depositors were not content to leave their money in low-interest-bearing passbook savings accounts; they sought out better investment opportunities and moved their money accordingly. A savings bank could not hope to stay in its depositors' good favor unless it paid higher interest on savings accounts, but to do so meant the bank had to pay more on

deposits than it was receiving on long-term loans--loans made years earlier when lending rates were low.¹⁵

In the face of record inflation, the Ford administration had the option of doing nothing (in the belief that economies are resilient), or taking some action. The administration chose to pursue an income tax cut and reductions in federal spending. Whether attributable to this stimulus or not, shortly thereafter inflation fell from around 12% to 6%. For complex reasons, during the Carter administration real estate prices and interest rates began to soar again. The S&Ls had gotten a reprieve from fiscal disaster during the period of controlled inflation, but they quickly returned to a position of instability. This precariousness was still grounded in flawed business practice: the S&Ls still “borrowed short and lent long.”¹⁶

Ford had espoused deregulation of a number of industries, among them transportation, communications, and banking. The Carter administration carried out some of these policies, especially in the areas of air travel and trucking, but not in banking. Acting on the belief that it was government regulation which was stifling competition and growth in the S&L industry, and not the inherent accounting problem described above, the Reagan administration lifted government regulation. Thrifts were then free to engage in new and riskier areas of lending, including speculative commercial real estate development. The problem was that thrifts were not--and are not--an independent industry; despite deregulation, the government still insured their depositors. In such a relationship, natural market forces cannot adequately assure fiscal responsibility.

Other factors compounded problems for the commercial banks. The oil producing Arab countries, after raising prices (and contributing to the United States recession), had made more money than they could spend in their own countries. In a practice encouraged

¹⁵L. William Seidman, *Full Faith and Credit: The Great S&L Debacle and Other Washington Sagas* (New York: Random House - Times Books, 1993), 17-21.

¹⁶*Ibid.*, 22.

by the United States government, the Organization of Petroleum Exporting Countries (OPEC) deposited some of their surpluses in U.S. banks. The banks, in turn, made very large loans to Latin American countries in the belief that this would enable them to buy more U.S.-produced goods.¹⁷

From the standpoint of OPEC, this was good business practice: they were not risking their money by lending it directly; U.S. banks were taking the risk. However, in 1982, interest rates climbed resulting in world recession and Latin American borrowers could not make payments on their loans. A lot of money was at stake: total loans to the Third World were equivalent to three times the lending banks' capital.¹⁸ If the loans could not be repaid, the federal government was the insurer. If the banks were large enough not to be made insolvent, they would have to make up their losses in fees to their customers. Smaller banks and thrifts posed the greater risk to the insurance funds since most of their deposits were under \$100,000 and therefore insured by the funds.

The relationship of the FDIC to its member banks

The FDIC is considered a very successful federal program--one which creates its own revenue. One can deduce that one of the reasons FDIC is loathe to be regulated at any time, including when disposing of cultural resources, is its long history of independence. Its insignia and trademark are recognized and trusted; banks are required to display them. The FDIC receives no money from Congress and therefore its accountability to other branches of government is minimal. FDIC directors may only be removed before their term expires for immoral, unethical, or illegal action. While enjoying great independence from the legislative branch, the FDIC's responsibilities are huge--regulating and insuring 9,000 state banks. (National banks, fewer in number but

¹⁷Ibid., 36.

¹⁸Ibid., 37.

greater in total assets, are supervised and regulated by the comptroller of the currency.)¹⁹ In addition, through the FSLIC sister fund, the FDIC insured thousands more thrift institutions.

Early in its history (and long before the National Historic Preservation Act of 1966 (NHPA)) FDIC handled hundreds of bank failures resulting from the Great Depression. Then FDIC resolved only a handful of bank failures between 1940 and 1980. Most banks and thrifts do not fail because of criminal wrongdoing. They fail in a weakened economy, when large numbers of people find themselves unable to make mortgage payments, revealing undersecured loans. Compounded by the unsound “borrow short, lend long” principle, the S&L debacle of the 1980s was fanned by deregulation.

The FDIC or FSLIC could not choose which risks it wished to insure; all depositors were backed by the full faith and credit of the United States government. Since banks and S&Ls make money by lending money, an institution trying to remain afloat was motivated to attract new depositors by offering higher interest rates and to seek higher returns by lending money in riskier ventures. But the risk was not the depositor’s or the bank’s; it was the United States government’s.

The policies implemented in the 1980s under Reagan, which allowed and encouraged S&Ls to enter new and riskier projects, and increased the insured deposit maximum from \$40,000 to \$100,000, led to unprecedented overbuilding and the near-collapse of the U.S. financial system.²⁰

FIRREA and the Resolution Trust Corporation

In the face of a dramatic escalation in the number of S&L insolvencies, the insolvency of the fund intended to insure the S&Ls, and unprecedented costs to the

¹⁹Ibid., 67-68.

²⁰Ibid., 138-140, 160-162, 175-176.

taxpayers, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). Its purpose was principally to “resolve” the affairs of the failed S&Ls--that is, to dispose of assets and repay depositors--and to increase regulation of the thrift industry.

FIRREA created a new entity called the Resolution Trust Corporation (RTC) which would sell off the assets of the bankrupt S&Ls. The RTC itself would fall under the aegis of the FDIC through a complex structure of supervision and regulation.²¹ Tables 5 and 6 illustrate the oversight and organizational structure of RTC. Its duty was to achieve maximum return on liquidated assets as quickly as possible. Selling off the assets would cost money; Congress understood that not only would the assets not fetch their full mortgaged value but that merely holding the assets cost money in the mean time. Whereas its predecessor FSLIC supported its operations through insurance premiums paid by the S&Ls themselves, RTC’s work was shifted to taxpayers through a fund established by Congress: the Resolution Trust Fund. FDIC continued to fund itself through insurance premiums. The total estimated cost of the bailout to American taxpayers is ultimately expected to reach several hundred billion dollars--principally the result of a collapsed real estate market and undersecured loans.

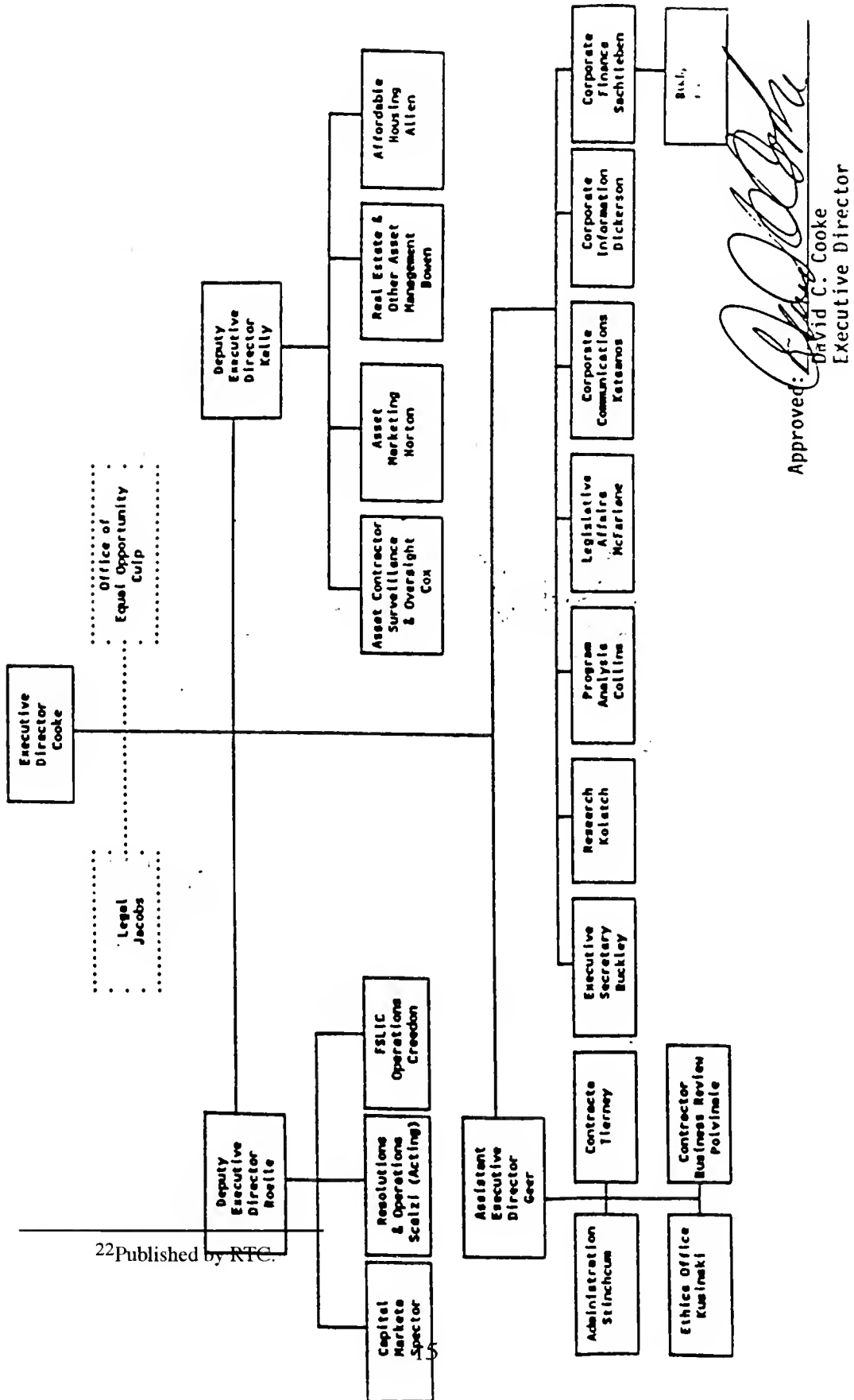
RTC was to liquidate the assets while avoiding “dumping” of large numbers of properties, which itself might place further stress on precarious real estate and financial markets. Many have said that the inherent conflicts of the RTC’s mandates were insoluble from the beginning: How can an agency whose mission it is to sell billions of dollars of assets as quickly as possible, for as high a price as possible, do both without flooding already unstable markets?

As a result of FIRREA, the RTC took over responsibilities of the FSLIC and the

²¹Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101-73, sec. 101 (1989).

April 29, 1991

Table 5: Oversight Structure of RTC²²

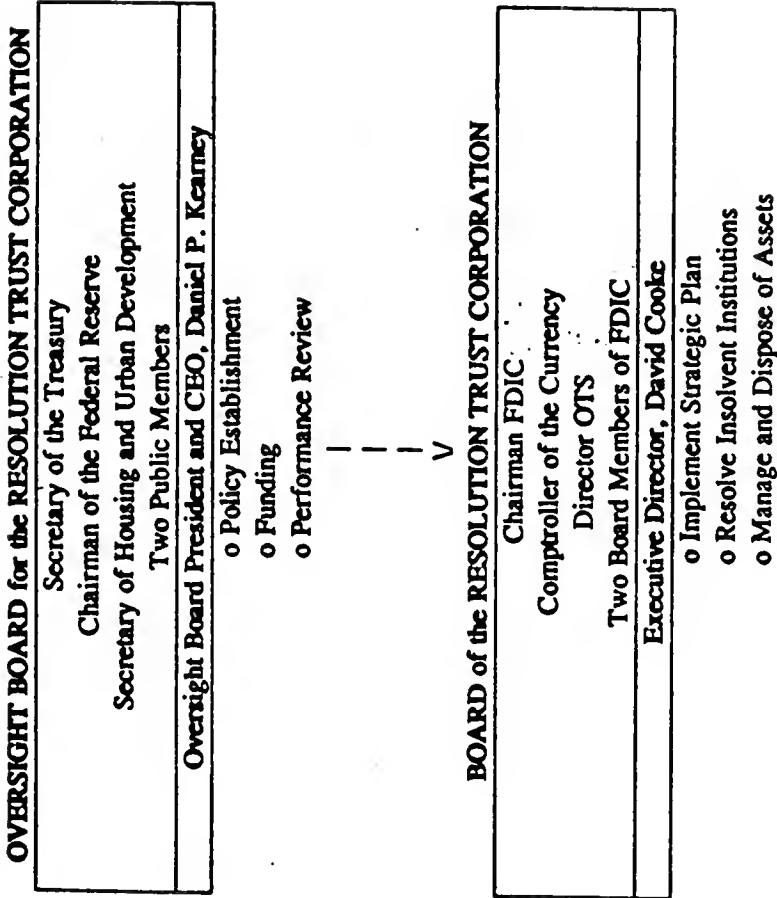


Approved: *David C. Cooke*
David C. Cooke
Executive Director

²²Published by RTC.

Table 6: Organizational Structure of RTC²³

ORGANIZATIONAL STRUCTURE



²³Published by the Texas Center for Policy Studies.

Federal Home Loan Bank Board (both of which were abolished) and an Office of Thrift Supervision (OTS) was created. Toward FIRREA's aims of reform and enforcement, RTC was charged with responsibility for all institutions previously insured by the FSLIC and which entered conservatorship or receivership between January 1, 1989, and August 9, 1992. Through extensions provided in the RTC Refinancing, Restructuring, and Improvement Act of 1991, and in the Resolution Trust Corporation Completion Act, the RTC's authority to take institutions into conservatorship or receivership was extended through at least January 1, 1995.

FIRREA gave RTC the same powers FDIC had over its insureds and, in turn, FDIC was to manage all the operations of RTC. In addition, FIRREA authorized FDIC to begin to insure deposits of S&Ls and to regulate their activities. Because of FIRREA, FDIC had the authority and obligation to examine any depository institution whose solvency was thought to be threatened.

FIRREA imposed new restrictions and standards of accountability on banks and S&Ls. The Act instituted certification standards for appraisers involved in federally regulated real estate transactions so as to prevent future loans from being undersecured. FIRREA also established severe penalties, ranging from \$5,000 to \$1 million per day, for violating any of the Act's provisions.²⁴ While expanding regulatory powers of the FDIC and its newly created RTC, the RTC was prevented from using any FDIC funds in carrying out its mission.²⁵

When RTC completes its legislated work in early 1995, it will, presumably, still have unsold assets. According to the RTC Completion Act, a task force will facilitate the transfer of assets, personnel, and operations from RTC to FDIC.²⁶

²⁴Stuart M. Safi, "The Basics of FIRREA and the Resolution Trust Corporation," The Real Estate Finance Journal v6n3 (Winter 1991): 48-50.

²⁵*Ibid.*, 52.

²⁶RTC Completion Act, Senate Bill 714, November 19, 1993, Sec. 6.

Chapter 3

The world's biggest fire sale: How the liquidation process works

FIRREA spells out how the recovery obligations of the RTC and FDIC are to be performed. Liquidation of assets is only one of three means; RTC or FDIC could also rescue an insolvent institution by merging it with a stronger one or by selling it as an operating entity. When rescuing failing or failed institutions, RTC and FDIC may each act in three distinct capacities: these are defined as “conservator” for failing S&Ls or banks, “receiver” for failed S&Ls or banks, and as a “federal corporation.” In practice the distinctions are blurred, but both RTC and FDIC have tried to distance their actions in resolving financial institution failures, whether as a federal corporation, conservator, or receiver, from their regulatory functions more typical of a federal agency. They use the distinction to avoid compliance with the National Historic Preservation Act (NHPA). These distinctions can also affect how an interested buyer approaches the RTC.

For S&Ls, conservatorship is initiated when the Office of Thrift Supervision suspects financial insolvency and initiates an assessment of the institution in question. If a thrift is placed in conservatorship, it continues to operate but under the supervision of the RTC as conservator. The conservator typically focuses on increasing the efficiency of the institution and may occasionally sell liquid assets such as stocks and bonds. In the meantime, the conservator attempts to sell the institution as an operating business.

In the absence of a buyer, RTC is appointed as receiver. At this point, the conservatorship goals of keeping the institution intact cease and receivership activities begin. In its receivership capacity, RTC works to wind up the operations of an institution. As the receiver, RTC sells any liquid assets, pays off insured depositors, and assumes ownership of the non-liquid assets such as real estate. Crossing over another blurred line, once RTC has assumed ownership of non-liquid assets, it claims it is acting in a distinct

capacity as a federal corporation. This is the stage where the marketing and sale of non-liquid assets begins.

RTC uses primarily independent contractors as asset managers to market and sell properties. This practice is directly related to the temporary nature of the agency, in contrast to the FDIC which performs most of these functions in-house. When RTC liquidates assets, it pays a fee to the asset manager and the net proceeds go into the Resolution Trust Fund as operating capital.

FDIC may perform the same functions for failing banks as RTC performs for thrifts, and FDIC may also operate as conservator, receiver, or federal corporation. When FDIC liquidates assets, the money is plowed back into its insurance fund. FDIC claims a distinction similar to RTC's: When liquidating assets in its corporate capacity, FDIC is not a federal agency and not subject to NHPA. FDIC also has the unique authority to create a "bridge bank," a temporary institution which may be designated owner of a failed bank's assets and liabilities. By statute, even though funded and controlled by FDIC, a bridge bank is not an agency of the federal government. This can mean that bridge banks are exempted from NHPA and certain environmental laws.²⁷

In order to identify potentially significant properties under RTC or FDIC control, one must understand the information systems used by the agencies and how they can be accessed. RTC, because it is a new agency dealing with an overwhelmingly large inventory, started with primitive systems which have been quickly evolving since. Its holdings are published on compact disk, RTCNet (an on-line subscription service for IBM-compatible personal computers), floppy disk, multi-volume paper printouts (available for purchase or for review at Federal Depository Libraries), and through specific inquiry. In 1993, RTC has brought on-line the mainframe-based Real Estate

²⁷David Frederick and Scott Baker, eds., The Other Side of the Bailout: A Guide to Protecting Environmentally Significant RTC and FDIC Lands (Austin, Texas: Texas Center for Policy Studies, 1991), pp. 10-11.

Owned Management System (REOMS) which may be accessed by RTC employees and asset managers nationwide. All RTC listings are available to the public on paper, in computer-readable formats, and via modem, although the agency may charge a nominal fee. An inquiry will normally yield a property's RTC asset number, the name and telephone number of the asset manager, the property's type and description (such as "single family house"), and may indicate special significance, if any.

FDIC information is less accessible. Its assets include those of failed banks and of S&Ls which failed before FIRREA took effect on January 1, 1989. Interested buyers must hunt for properties of special cultural or natural significance through FDIC publications or by contacting FDIC regional offices or consolidated offices. No modem access is available and FDIC is not required to identify special resource properties in any way.²⁸

FIRREA requires RTC to publish an inventory of its real estate holdings semiannually, although in practice the database is updated daily. This mandate specifies that the inventory "shall identify properties with natural, cultural, recreational, or scientific values of special significance." In the writing of FIRREA, Senator Timothy Wirth of Colorado urged Congress to recognize the importance of natural and cultural resources and require, through the Act, that the RTC take special protective measures with regard to these properties. In a compromise with Senator Phil Gramm of Texas who felt this would detract from RTC's primary mission, FIRREA required identification of such assets but said nothing about protection.²⁹ The compromised omission has created a statutory conundrum: "Identify," it says, but do not necessarily protect.

In nearby text in FIRREA, Congress' intent to satisfy several priorities beyond mere liquidation is clear. For example, FIRREA outlines at length procedures for the

²⁸Ibid., pp. 22-23.

²⁹Ibid., p 18.

advertising and sale of residential properties in order to encourage home ownership among low- and moderate-income families, women and minorities, the homeless and other disadvantaged groups.³⁰

Working within such special provisions has created a bid process which some describe as cumbersome. From early in the RTC's history it was clear that its real estate holdings were too numerous and geographically dispersed to sell them all using only conventional real estate methods; such individualized marketing would have taken decades to complete even under the best conditions.

Early on, the agency encountered particular difficulty in selling illiquid assets where established secondary markets did not exist. The RTC recognized that it would have to design new approaches, especially for disposing of hard-to-sell assets. In addition to traditional individual sales, RTC therefore began using auctions, sealed bid auctions, donations (in limited and rare cases), and portfolio sales. Neither RTC nor FDIC has an official discount policy for culturally or environmentally significant properties and neither will donate any property which is deemed to have market value.³¹ The portfolio- or bulk-sales program was developed for disposing real estate as well as such assets as consumer loans and commercial mortgages.³² Statutes require that RTC and FDIC pursue the highest achievable price for all assets.

The first RTC bulk sale was completed in March, 1991, and many others have followed. RTC's goal in organizing these packages of properties is to realize efficiencies of scale and expedite the resolution process. The packages are designed to appeal to large investors and always include, among the collection of attractive assets, a smattering of hard-to-sell properties.

³⁰FIRREA, Sec. 501.

³¹Frederick and Baker, p. 4.

³²Leonard Sahling, "Managing the Cleanup of the Thrift Crisis," Real Estate Review v22n4 (Winter 1993): 53-54.

Bulk packages are generally sold through an auction managed by a sales agent hired by the RTC. A package is sold to the highest bidder after a thorough marketing campaign. Such a system was not even possible prior to May, 1991, when regulations required RTC to sell property at 90% of “market value”--then defined as “appraised value.” A new definition assumes market price to be the highest bid received after reasonably thorough marketing. Further incentive to accept bids lower than 90% of appraised value is provided by the pressing issue of property maintenance: without sufficient property management capabilities, the longer RTC holds any real estate asset, the more it will decline in value.³³

The bulk sale and auction process provides incentive to buyers because an investor willing to purchase such a package will usually get a very good value. But the program has many drawbacks as well. A prospective buyer places himself at financial risk because there is a vacuum of information about the properties he is considering.

In a normal, private sale, a buyer who expresses an interest in a property will have access to all applicable records. He will conduct a due diligence investigation of the building, site, title, and any leases. RTC has little information on the properties it is selling and offers even less in the way of warranty. Defects which the buyer discovers after the closing, and which were not factored into the price, may or may not be repaired at RTC's expense. (RTC will repair defects exceeding a certain dollar threshold when they are deemed to be the result of flawed materials--not normal wear and tear--which begs the question, “What is a roof leak?”) The RTC does not even make available to the buyer standard documents such as certificates of occupancy, flood plain certifications, or title insurance policies.³⁴

³³Ibid., 54-56.

³⁴Robert K. Hagan, “The Cumbersome RTC Bid Process,” Real Estate Review v23n2 (Summer 1993): 63-69.

The RTC Completion Act, signed into law in January, 1994, revised again the way RTC does business. It also legislates the dissolution of the RTC, scheduled for early 1995. RTC must now market all properties individually for 120 days before going into a bulk sale.

In theory, it should be easy to buy a property from the RTC. One need simply call the asset manager and express an interest. In practice, however, small investors frequently encounter a cumbersome bid process combined with incomplete or inaccurate information. This is reportedly especially common with regard to special resources.

For example, FIRREA mandates the semiannual publication of a special resources inventory. Since enactment of FIRREA, practices have evolved and the inventory is actually published monthly. However, when contacted by telephone, few RTC information centers were aware of this change. This is a significant missing link, since the list has legal document status: environmental and preservation groups have only forty-five days from the date of publication to find a buyer for any property in the Special Resources Clearinghouse. During that time, the RTC may advertise, but may not close on, any listed asset.

The RTC uses thousands of private subcontractors, known as asset managers, to sell properties. The subcontractors are too numerous for RTC to manage effectively. In one case in early 1993, a prospective buyer called a New Orleans asset manager regarding a specific property identified in the Special Resource Clearinghouse as containing historic architecture. The buyer was told that all RTC properties in New Orleans had been sold. Through contacts with the SHPO and the ACHP, who had reviewed a large inventory of properties only a month before, the buyer knew it was highly improbable that all assets in New Orleans had been sold. It turned out that the

asset manager's inventory was in the process of being transferred to another firm and so the current asset manager did not want to be bothered.³⁵

In its instructions to asset managers, RTC gives an official nod to the merits of recognizing and identifying special resources in its inventory. "The presence of certain special resource values such as wild and scenic rivers may enhance a property's value and/or may attract public or private buyers interested in conserving the resource. In contrast, the presence of an environmental hazard may decrease the value of an asset, increase RTC's management costs, and complicate disposition of the asset."³⁶

Although RTC identifies and publishes the Special Resources Clearinghouse, and must adhere to the forty-five day closing moratorium, no further special consideration is given to these assets. RTC will not pursue historic preservation easements or any other restrictive covenant in deeds to its properties. RTC argues that such covenants necessarily detract from the retrievable value of any property, and thus conflict with the agency's statutory mission to obtain the highest possible return. The Special Resources Clearinghouse thus only has value as an identification tool to alert historic preservationists and environmentalists to the availability of potentially threatened resources.

³⁵Conway.

³⁶RTC Manual 10100.3, Environmental Guidelines and Procedures Manual, 17 September 1990, p. 2.

Chapter 4

Protecting history: Placing the National Historic Preservation Act in legislative context

At the core of FDIC and RTC's ability to avoid historic preservation objectives is their adamant position that the National Historic Preservation Act (NHPA) does not apply to them when they are liquidating property. One could easily construct an argument that an agency acting as intermediary between one private owner and another resembles private enterprise more than government action. However, that brief period of government involvement has broad implications--triggering laws which might not otherwise apply in private undertakings.

The NHPA was enacted in an environment of mammoth federal undertakings, not unlike the banking crisis clean-up. After World War II, the United States embarked on some of the largest public works and urban renewal projects in its history. The construction of the interstate highway system charted the beginning of a rapid change in American settlement on the land. How American cities have evolved, where new American cities have developed, and the relationship between where Americans live and work has not been the same since.

Some time into this intensive period of construction Americans recognized that the visionary projects which were leading the nation to its future were at the same time destroying its past. There were costs involved when constructing an interstate highway through urban fabric, and the costs could not be measured only in dollars.

In 1966 Congress enacted the National Historic Preservation Act in order to force the formal consideration of these intangible costs when they were the result of federal undertakings. The NHPA set up a system to identify and list significant resources of the built and archaeological environments. The Act established the Advisory Council on Historic Preservation (ACHP) to advise the President and Congress on policy issues

related to historic preservation. In years following, the Act has spurred participation in preservation planning by state and local governments, many of which have enacted their own preservation policies and laws. In a 1986 retrospective analysis of NHPA, the Advisory Council does not attribute the sweeping national changes in preservation attitude solely to the Act. It considers NHPA one component of a growing American concern and respect for its heritage--the coming of age of a country just beginning to recognize its own culture as worthy of preservation.³⁷

The NHPA established the National Register of Historic Places, maintained by the Secretary of the Interior, as a system for identifying culturally significant manmade sites. A large portion of NHPA deals with creating frameworks for identification of historic resources through cooperative arrangements with state governments and private preservation groups. The identification process is crucial to the enforceable protection offered under NHPA: once a building or site is deemed eligible for listing in the National Register, Section 106 provides a highly influential mechanism for mitigating federal or federally assisted actions which might harm the cultural resource:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.³⁸

Federal actions deemed to be “undertakings” initiate the review process under Section 106:

³⁷Advisory Council on Historic Preservation, The National Historic Preservation Act of 1966: An Assessment of Its Implementation Over Twenty Years, September 1986, pp. 2-3.

³⁸National Historic Preservation Act of 1966, As Amended Through 1992, Public Law 102-575, Sec. 106.

“Undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit, license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.³⁹

Section 106 of NHPA, though only one paragraph, has become the linchpin of United States federal historic preservation policy. The review process it initiates, administered by the Advisory Council (an independent federal agency), ensures that any federal or federally assisted undertaking considers potential adverse effects on the Nation’s historic resources.⁴⁰

Section 110 proscribes the responsibilities of the head of each federal agency in assuring compliance with all provisions of the Act, including Section 106. Agencies are responsible for establishing an active program to identify historic properties under their ownership or control and for consulting with the Advisory Council as mandated.

In 1992, amendments to NHPA strengthened the language of the NHPA, particularly with regard to Sections 106 and 110. The expanded and clarified definition of “undertaking” is quoted above. Section 110 now compels federal agencies, unless specifically exempted (neither RTC nor FDIC is so exempted), to “establish a preservation program for the identification, evaluation, ...nomination to the National Register,” and protection of historic properties under their control. The amendments hold each federal agency responsible for seeing that loans, permits, licenses, or other assistance are not granted to applicants who have intentionally allowed a historic resource to be adversely affected in order to avoid Section 106 review.

³⁹Ibid., Sec. 301.

⁴⁰Section 106 of NHPA is only one paragraph. The Advisory Council’s regulations for its implementation, however, are quite detailed. Publications on Section 106 review procedures are available from ACHP.

Under procedures devised by the Advisory Council, a federal agency considering an undertaking begins by identifying any historic properties which may be affected (see Table 7). The agency may consult with the State Historic Preservation Officer, and with other preservation groups, in assessing the significance of a cultural resource. Section 106 gives equal treatment to properties already included in the National Register and those that are eligible for inclusion.

The agency responsible for the undertaking, after identifying a historic resource, then must assess whether the undertaking will have: “No effect;” “No adverse effect;” or an “Adverse effect” on the property in question. It makes this assessment in consultation with the SHPO. If the determination is made that the undertaking will have an adverse effect, the agency executes a Memorandum of Agreement (MOA) with the SHPO and, in some cases, with the Advisory Council, which outlines steps the agency agrees to take to avoid or lessen the adverse effect. Once the agency submits the MOA, the Advisory Council has up to thirty days for review and comment.⁴¹ If no MOA can be negotiated, the agency must obtain and respond to the Advisory Council’s comments before proceeding with a project.

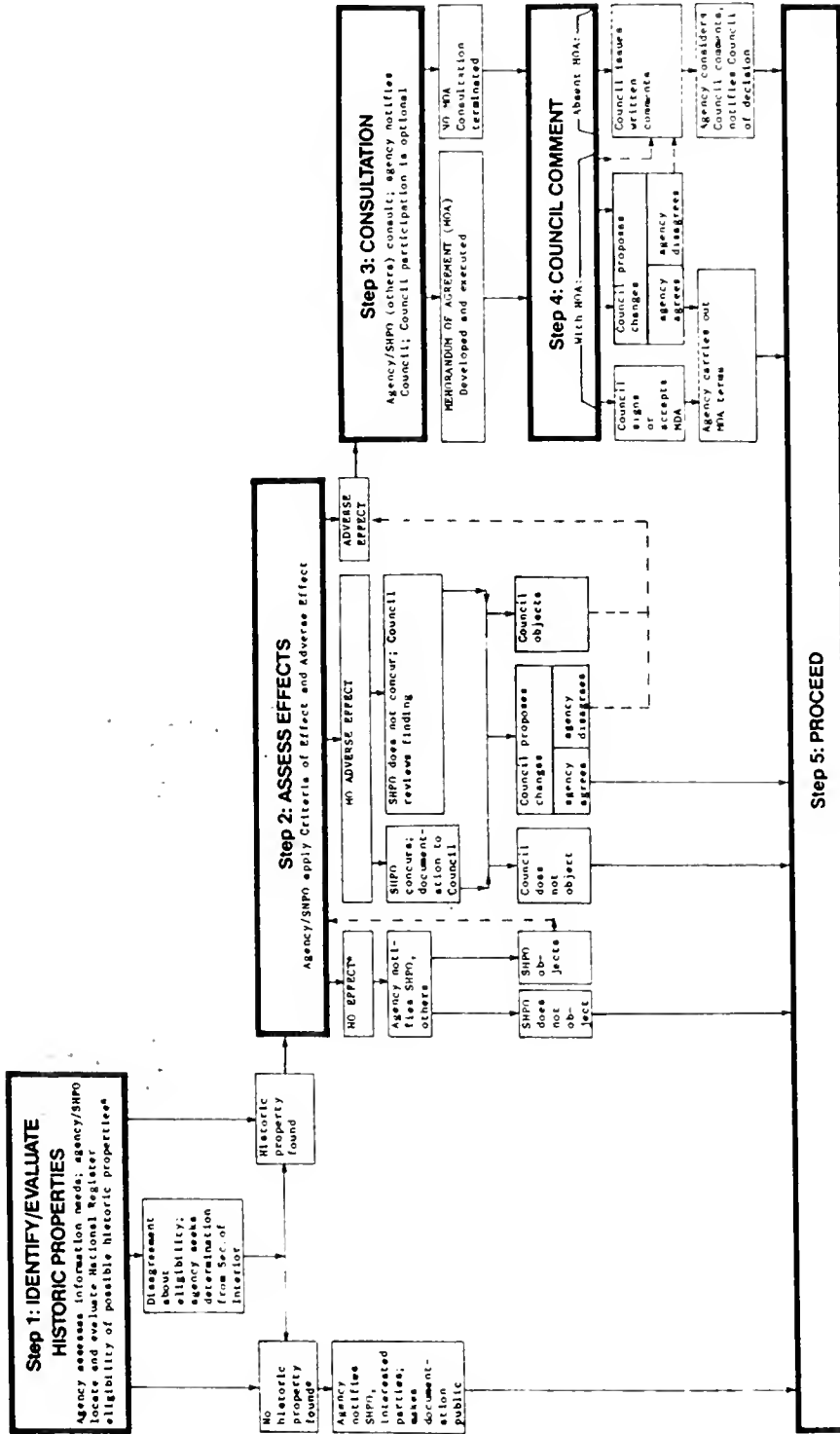
NHPA’s definition of agency is broad. Congress designed Section 106 to be very inclusive of the agencies which must adhere. But among the many federal agencies, some are more adherent than others. It is outside the realm of this discussion to assess the effectiveness with which various agencies comply with NHPA. Nevertheless, the ACHP’s working relationship with other federal agencies, such as the Department of Defense and the General Services Administration, informs an understanding of its relationship with RTC and its non-relationship with FDIC.

Preservation and the Department of Defense (DOD) seem at first to be unlikely

⁴¹Advisory Council on Historic Preservation, “A Five-Minute Look at Section 106 Review,” revised December 1992, pp. 1-3.

Table 7: Section 106 of NHPA Diagrammed⁴²

Figure 1: THE BASIC STEPS OF SECTION 106 REVIEW



• Public may request Council review of agency's findings at these points

partners. Yet the preservation movement gained a great deal of momentum in establishing a positive relationship with DOD from a common goal to preserve and protect historic Civil War battlefields. Many of these have since been designated parks and historic sites. But DOD owns many facilities important to the interpretation of American history which remain in current use. Viewed in a context of the DOD's responsibility for national security, and its shrinking budget, the issues involved in preservation of these properties are far more complex than saving historic battlefields. Through memoranda of agreement, the Advisory Council has advised DOD on management and disposition of many historic resources. Despite DOD's claims of overarching defense responsibilities, DOD has consulted with the Advisory Council to preserve its most significant cultural resources.

The Advisory Council characterizes DOD's compliance with NHPA as "inconsistent."⁴³ ACHP commended in 1992 the historic structures program at Fort Sam Houston in Texas, and cultural resource management at twelve other installations nationwide. Some DOD sites from the Cold War have even been designated National Historic Landmarks, such as the White Sands Missile Range in New Mexico where early atomic bombs were tested and early manned rockets were launched.

From a computerized Historic Resources Management Plan at West Point, New York, to preservation of natural and cultural resources including historic mullet ponds at the Marine Corps Air Station at Kaneohe Bay, Hawaii, DOD has proved itself to be a highly capable manager and interpreter of its historic resources without elevating historic preservation above the agency's primary mission. ACHP has been instrumental in many of these efforts. ACHP notes there are many significant sites which have escaped proper

⁴³Advisory Council on Historic Preservation, Report to the President and Congress of the United States, 1992, ACHP, Washington, DC, 1992, p. 32.

management and, while commending the achievements, advocates improved funding levels and training of DOD staff to better care for its culturally significant resources.⁴⁴

The General Services Administration (GSA) manages the largest inventory of federal properties. Many of the buildings managed by GSA are listed or eligible for listing in the National Register. Since GSA is continually building, altering, or selling federally owned properties, it is the Advisory Council's most frequent client.

Some of GSA's undertakings have impact on sites important enough to raise a dust bowl of public attention. That is precisely what happened when the Agency began excavations for construction of a new Federal Building at Foley Square in New York City. It unexpectedly uncovered the human skeletal remains of the "African Burial Ground," a colonial era cemetery of freed and enslaved African Americans and Revolutionary War soldiers. ACHP notified GSA of its obligations to investigate the site under NHPA and, after some wrangling, a Memorandum of Agreement (MOA) was signed.

Excavations for the building's foundation had already begun and more skeletal remains were being uncovered daily. GSA, in an effort to avoid potential construction delays or design modifications, sang the battle cry often sung by federal agencies when faced with delay due to Section 106 review: GSA cited its mandate and its obligation to adhere to a Congressionally approved prospectus.⁴⁵

As the size and rarity of the archaeological find became clear, GSA found it could not easily ignore the estimated 20,000 burials. Although GSA cooperation was not forthcoming, public pressure, especially from the New York African American community and Congressman Gus Savage of Illinois, came to bear. Ultimately, construction was halted and Section 106 review initiated to find ways to mitigate

⁴⁴Ibid., pp. 30-43.

⁴⁵Ibid., pp. 64-65.

destructive excavations at the cemetery. The site is now a National Historic Landmark and GSA, in consultation with the Advisory Council, is drafting plans for appropriate interpretation, commemoration, and memorialization of the African Burial Ground.⁴⁶

It is frequently the case in Advisory Council work that passion for an important site evokes public outcry which allows a thorough Section 106 review. Without the voice of the local community and a particularly interested congressman responsible for GSA oversight, it is unlikely that the burial ground would have been preserved. If public opinion is not strongly and unanimously behind preservation objectives, Section 106 is often not fully implemented and historic resources may be lost.

Similar to its role in agencies' management of historic resources, the Advisory Council also steps in when an agency undertaking involves the deaccessioning of a such a resource. Sometimes, as in the case of the Presidio military base in San Francisco, the resource is transferred to another agency, such as the National Park Service, charged with responsibility for preserving it. A property may also be offered for sale to a private buyer. Several historic light houses on the East coast, formerly owned by the Coast Guard and now obsolete, have been the subjects of these controversial transactions. Both transfer to another agency and sale to a private buyer are potential outcomes of Section 106 review and can be used to mitigate harm to a historic resource. Integrity is usually achieved by incorporating restrictive covenants in the deed.

Before being deaccessioned to a private buyer, a surplus property of any agency must wind its way through a flow chart in a process administered by GSA to see if alternative uses exist within another branch of government. If no public use is found, a property ends up on the auction block. If identified as eligible for listing in the National Register, ACHP then works to facilitate the property's sale to a sensitive buyer. This is typically accomplished by executing a memorandum of agreement between the Advisory

⁴⁶Ibid., pp. 65-70.

Council and the agency holding the surplus property. In that agreement, the agency agrees to consult ACHP and explore ways to assure the permanent integrity of the resource.

The Advisory Council recognized the need to take a different approach with an agency such as RTC which assumed transitory, “crisis management” control of an unknown number of historic properties. A shortage of time, information, and cooperation prevented standard Section 106 review.

As noted earlier, RTC has claimed it is not a federal agency when acting as an asset liquidator and that it is therefore exempt from the Section 106 review process. It was ironic when, out of its need to comply with FIRREA’s mandate to inventory cultural resources, RTC pursued a working relationship with the Advisory Council to help identify such resources. (RTC did not have the expertise to create the inventories on its own.) A memorandum of agreement with RTC, signed in late 1992, called on the Advisory Council to establish survey standards to assess the RTC’s inventory, provide recommendations for emergency stabilization of cultural resources under the control of RTC and its asset managers, and to notify preservation organizations and state and local governments when a historically significant property was available for sale. The Advisory Council in turn subcontracted much of the identification work to SHPOs nationwide.⁴⁷

⁴⁷Ibid., pp. 52, 95-96.

Chapter 5

Parallels in the environmental movement: The RTC owns wild rivers and old growth forests, too

Even with Section 106 of the National Historic Preservation Act as an effective tool, preservationists were late in mobilizing to protect historic resources under the transitory control of the RTC and FDIC. Environmentalists were quicker to act, more organized, and better funded than preservationists in initiating protection of environmentally sensitive properties, lumped together with historic properties as “special resources” in the language of FIRREA.

Many of the lands owned by RTC possess remarkable natural attributes. RTC has owned land in Texas which contains habitats for endangered jacarundis and ocelots; it has controlled ownership of Nags Head Woods on North Carolina’s Outer Banks with sixty-foot dunes and 500-year old trees.⁴⁸ It owns or has owned many vacant lands which feed natural aquifers supplying large population centers, as well as countless wetlands and other environmentally sensitive properties.

Although all of these properties had previously been in private hands, as with cultural resources which came into federal ownership, the protection laws enacted over the past twenty years were presumed by environmentalists to apply. These laws had served to mitigate adverse environmental impacts when the federal government was involved in an undertaking or development.

The Texas Center for Policy Studies, an independent “think tank” in Austin with a focus on environmental issues, has published a manual to aid environmental groups in protecting sensitive lands under RTC and FDIC control. The Texas Center maintains, despite RTC and FDIC position statements to the contrary, that the agencies are responsible for adherence to the nation’s environmental laws. They note that these laws

⁴⁸Frederick and Baker, p. 1.

allow few exceptions and have been found to apply to other non-environmental arms of the federal government, including agencies charged with resolving other “crises.”⁴⁹

Congress has taken some steps to assure protection of certain sensitive lands under RTC and FDIC control. A 1990 amendment to the Coastal Barrier Resources Act (COBRA) requires these agencies to offer exclusively to conservationists certain large tracts of undeveloped land on barrier islands. RTC and FDIC have also agreed to consult Fish & Wildlife Service in inventorying and identifying (but not necessarily protecting) potentially significant undeveloped lands.⁵⁰

There are simply more federal environmental protection laws than historic preservation laws. This could be the result of a highly institutionalized, better-funded movement, but whatever its source, it certainly provides conservationists with more tools when they seek concessions from RTC and FDIC.

The National Environmental Policy Act of 1969 (NEPA) marked the earliest Congressional mandate to federal agencies to consider the environmental impacts of their actions. Many agencies initially contested the law’s applicability to them. Agencies argued that NEPA conflicted with their primary mission and therefore they were exempt. The Atomic Energy Commission (now the Nuclear Regulatory Commission) argued that it could not simultaneously consider environmental risks while advancing a safe nuclear industry. This and other agencies noted that environmental protection was the job of environmental protection agencies.

Federal courts have repeatedly upheld the applicability of NEPA and other environmental laws.

Whether or not the spectre of a national power crisis is as real as the [Atomic Energy] Commission apparently believes, it must not be used to create a blackout of environmental consideration in the agency review

⁴⁹Ibid., pp. 1-2.

⁵⁰Ibid., p. 3.

process. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F. 2d 1109, 1122 (D.C. Cir. 1971).⁵¹

This citation notwithstanding, Dinah Bear, General Counsel to the Council on Environmental Quality, noted in her testimony before Congress the difficulty she has had in ascertaining NEPA's applicability to RTC and FDIC. She pointed out that although FDIC has considered itself a federal agency for purposes of NEPA since 1980, FIRREA may have changed that applicability with regard to its--and RTC's--actions in their receivership roles.⁵²

The major environmental protection laws which apply to any undertaking by a federal agency, or to the granting of any permit for such an undertaking, include NEPA, the Endangered Species Act of 1973 (ESA), the Safe Drinking Water Act (SDWA), Executive Order No. 11990 (E.O. 11990--"Protection of Wetlands"), and the "Superfund" law (Comprehensive Environmental Response, Compensation and Liability Act--CERCLA). RTC and FDIC are among the few federal agencies who still claim exemption from these laws.⁵³

Under NEPA, government agencies must consider the environmental impacts of their actions to the fullest extent possible. Among its mandates, NEPA requires the preparation of an Environmental Impact Statement (EIS) for any major federal action which affects the environment. A "federal action" includes the proposed sale of a property; however, if RTC and FDIC were to follow NEPA, reasonable exclusions in the law mean they would not have to prepare an EIS for most sales. Only sales involving environmentally significant properties would be affected.

⁵¹*Ibid.*, p. 13.

⁵²Congress, House of Representatives, Hearing before the Resolution Trust Corporation Task Force of the Committee on Banking, Finance, and Urban Affairs' Subcommittee on Financial Institutions Supervision, Regulation and Insurance, Natural, Cultural, and Recreational Resource Policy as it Relates to the Disposition of Assets by the RTC, 101st Cong., 2nd sess., 7 September 1990, pp. 8-10.

⁵³Frederick and Baker, pp. 13-14.

Government-wide compliance regulations were developed by the Council on Environmental Quality and many agencies have developed guidelines specific to their work. The General Services Administration (GSA) manages development on and disposition of government property as part of its routine business. GSA published regulations in 1985 to assure NEPA compliance in these undertakings.⁵⁴

Beyond NEPA's requirements for government agencies, the Endangered Species Act compels all "instrumentalities" of the federal government "to 'insure' that actions they authorize or carry out do not 'jeopardize the continued existence of any endangered species' or adversely modify critical habitat for such species." Agencies normally comply by consulting with the U.S. Fish & Wildlife Service on proposed undertakings and following their recommendations when necessary.⁵⁵

A 1974 amendment to the Safe Drinking Water Act gave authority to the Environmental Protection Agency to protect specific geographical areas of the country which function as critical recharge zones for aquifers which serve as primary drinking water sources. If EPA determines that a proposed federal or federally assisted undertaking will contaminate or otherwise adversely affect the purity of the aquifer, the project may not proceed. RTC and FDIC own or control lands falling within several of the fifty-five EPA-designated zones. Because the language of the amendment is inclusive of federally-assisted projects, even lands which are not necessarily owned by RTC or FDIC, but have fallen under their management through the agencies' involvement in an S&L's or bank's conservatorship, are subject to compliance.⁵⁶

Executive Order 11990 requires federal agencies to protect and, if necessary, withhold from sale federally-owned real estate containing wetlands. Because of the nature of the banking crisis, E.O. 11990 potentially affects a large number of properties. Most

⁵⁴Ibid.

⁵⁵Ibid., (internal quotes from ESA, 16 U.S.C. §§1531, Sec. 7).

⁵⁶Ibid., pp. 14-15.

S&Ls failed because they financed speculative developments which were never built, never completed, or never sold. Many of these developments were planned for sensitive coastal resort areas, so some undeveloped lands for sale by RTC or FDIC include these sensitive environments.⁵⁷

The Superfund law, or CERCLA, places liability for clean-up of hazardous materials on the owners or operators of contaminated properties. To clarify the definition of ownership, Congress exempted lenders when they are not the operators of the property but merely own an interest in the property to secure their financial stake.

However, when RTC or FDIC act as conservator, receiver, or corporate liquidator, they exercise great decision-making authority over the management, operation, and disposition of property. RTC and FDIC have concerns about their liability if a court is unable to distinguish between actions they may take to protect collateral versus actions which constitute property management, especially in light of the power RTC and FDIC wield in influencing decisions of lenders and borrowers.⁵⁸

Environmentalists have used political pressure, media pressure, lobbyists, and the pressure of the protection laws themselves to force conservation issues to the forefront of RTC and FDIC consideration. Although advocacy groups feel they have made little progress in demanding these agencies comply with applicable laws, various organizations have successfully rescued a large number of significant properties from what they considered destructive development. In fact, the very existence of a handbook such as that published by the Texas Center, which is meant to assist environmentalists in their efforts, is itself indicative of a level of funding and organization not yet seen in the historic preservation movement on this issue. Many environmental groups have gained outright control or a controlling interest in sensitive lands through creative purchases,

⁵⁷Ibid., p. 15.

⁵⁸Ibid., pp. 15-16.

assisted purchases, or easements. The techniques could be applied to properties with cultural significance as well.

Chapter 6

RTC Directives and Manuals: Who Identifies What?

Prior to RTC's issuing of its Environmental Guidelines and Procedures Manual on September 17, 1990, no standardized procedures existed for identification of special resources under RTC control. Publication of the Manual followed a Congressional hearing by the RTC Task Force of the Committee on Banking, Finance and Urban Affairs of the House of Representatives. On September 7, 1990, the Task Force had invited witnesses from environmental protection and historic preservation organizations to speak on the subject of RTC's natural, cultural, and recreational resource disposition policy.

Congressman Bruce F. Vento of Minnesota chaired the Task Force and in his introductory remarks noted that the purpose of the hearing was to understand "how two sets of important public goals--the recovery of the funds from failed savings institutions and the protection of significant environmental and cultural resources--intersect." He further noted that the goals were not mutually exclusive and that, in fact, the identification process could help the RTC realize a return on otherwise hard-to-sell assets. He criticized the fact that adequate inventorying procedures, and memoranda of understanding with appropriate environmental and preservation agencies, have been so long in coming.⁵⁹

At the hearing, David C. Cooke, Executive Director of RTC, made reassuring statements regarding RTC's desire to operate in a way which preserved the natural and cultural environment, but emphasized his statutory obligation "to pursue the best possible price for every RTC asset, including those with environmental importance."⁶⁰

Prior to publication of the Environmental Guidelines and Procedures Manual RTC had made a list of 1500 identified "special resource" properties having natural,

⁵⁹Congress, House of Representatives, RTC Task Force, pp. 1-2.

⁶⁰*Ibid.*, p. 7.

recreational, cultural, or scientific value. The list was later deemed to be worthless. It listed condominiums with tennis courts as having recreational value and shopping malls as having cultural value.⁶¹ The fact that this list may have been made in good faith alludes to the core of the problem: the list of identified properties (required of RTC by Wirth's provision in FIRREA, but not required of FDIC at all) is only as good as the individuals making identifications.

It was not until February 3, 1993, that RTC issued Directive 10010.43: "Identification of Cultural Resources on RTC Assets," their first explicit identification procedures. While the directive was an important step forward, it was years overdue and weak in its requirements. Beyond setting forth checklist guidelines and notification responsibilities of RTC once a resource is identified, according to the directive, if the Advisory Council recommends emergency repairs or an easement, the RTC asset manager then reviews the recommendations to see if they are in the RTC's interests. (See Appendix.)⁶²

The attitudes of mid-level management at RTC charged with special resource identification responsibility are compliant.⁶³ They favor the enlistment of ACHP and environmental agencies in the assessment process.⁶⁴ Nevertheless, RTC relies on its subcontracted private asset managers to do the field work. However good their intentions might be, asset managers are only hastily trained in special resource (environmental and cultural) identification through RTC seminars. Meanwhile, RTC oversight officials have insisted that statutes do not permit any special treatment of cultural resources beyond

⁶¹Frederick and Baker, pp. 18-19.

⁶²Resolution Trust Corporation, "Directive 10010.43: Identification of Cultural Resources on RTC Assets," 3 February 1993, pp. 9-10.

⁶³Michael Hein, National Environmental Specialist, RTC, Washington, DC, telephone interview by author, 18 February 1994.

⁶⁴Conway.

identification. Compounding the mixed signals is a systemic problem: The fox is guarding the hen house.

It is obvious that any effort to protect special resources depends first on a satisfactory inventory. Contributing to the inventory's shortcomings are the regular exclusion of assets under RTC conservatorship (as opposed to receivership), those with unclear titles, or properties in which RTC only owns a partial interest. In addition, a special resource property may easily be sold before it is even identified and listed.⁶⁵

In practice, RTC screens its real estate assets for environmental and special resource issues in two phases. "The objective of the asset screening is to separate those assets that are unlikely to have environmental issues associated with them from those assets that may have or definitely have environmental issues associated with them." It begins with a review of available files by the asset manager and completion of a field checklist survey.⁶⁶

Asset managers are instructed to visit the sites of properties which may have environmental or special resource issues. The Manual tells the asset manager to bring those evaluation checklists which may (emphasis included in Manual's instructions) apply to a particular property. Only data which are readily apparent to the observer without expert consultation are recorded. This evaluation's primary purpose is to ascertain presence of potential environmental hazards such as underground storage tanks, asbestos, toxic waste, etc. If this Phase I Environmental Site Assessment (ESA) yields potential environmental hazards, a Phase II ESA is initiated to confirm the presence of the hazard and determine the extent of contamination and necessary clean-up.⁶⁷

For culturally significant resources, the checklist filed by the asset manager asks: "Does this property contain a designated natural [sic] landmark (look for plaques

⁶⁵Frederick and Baker, pp. 21-22.

⁶⁶RTC Manual 10100.3, p. 6.

⁶⁷*ibid.*, pp. 9-11.

markers, or other indications of landmark status)?,” “Are any buildings or structures older than 50 years?,” and “Could this property be considered a Site (a place where a significant event...occurred...) whether or not buildings or structures are present?”⁶⁸ (See appendix for complete checklist.)

The outcome of the checklist may be one of three recommendations: If the surveyor finds no evidence of a historic building, structure, or site, no further study or action is recommended. If the surveyor suspects the presence of such a cultural resource, further study is recommended. Here is the catch: There is no RTC Phase II assessment for cultural resources. If Phase II ESAs for environmental hazards can be taken as a guideline, the logical Phase II assessment for cultural resources would be Section 106 Review. But there is no “further study” protocol and the assessment ends with the three-page checklist.

When an asset manager finds that a structure is over fifty years old, of unidentifiable age, or that an undeveloped property is larger than one acre, the Manual instructs him to notify national and state preservation agencies and alert them to the property’s availability. The list is also forwarded to the RTC regional office. RTC then enlists the Advisory Council on Historic Preservation to further assess and confirm the presence of any cultural resource on a particular property. The ACHP, in turn, enlists the help of SHPOs in identification, if ACHP has a signed contract for these services with the state having jurisdiction. If the presence of a cultural resource is confirmed by ACHP or a SHPO, the information is sent to RTC. The RTC, ACHP, and SHPO then send notices to asset managers in the appropriate states and the property is published in the monthly Special Resources Clearinghouse.

RTC contracted with George Scientific, Inc., to publish the Special Resources Clearinghouse. The project manager at George Scientific says her efforts to verify special

⁶⁸Ibid., “Checklist O,” pp. B-76 through B-78.

resource information go beyond her contractual obligations to RTC. She frequently contacts asset managers to minimize the number of properties which might fall through the cracks.⁶⁹ There may be unidentified lags and bottlenecks before George Scientific receives the data, but once published and mailed to an exhaustive list of preservation organizations, RTC must obey a forty-five day hold on sale of any listed special resource property while a sensitive buyer is sought. Michael Hein, National Environmental Specialist for the RTC, believes RTC finally has in place an efficient and effective system to identify cultural and environmental special resources. He acknowledges, however, that protection of those resources has been “problematic.”⁷⁰

The Advisory Council is not satisfied with the present arrangement. Up to this point, ACHP had “agreed to disagree” with RTC on the issue of Section 106 Review and helped RTC identify cultural resources in the inventory. However, the Advisory Council now believes that its limited resources are not being put to best use in this project, since RTC does little to protect identified properties. RTC maintains it has no choice, given its statutory obligations. In December, 1993, the Advisory Council was planning to terminate its contract with RTC in early 1994. For its part, RTC wishes to avoid such a termination because it would be left without a mechanism to fulfill its cultural resource identification obligations under FIRREA.⁷¹

It should further be noted that as this agreement nears collapse, the RTC will begin to wind up its own affairs over the next year. At that time, all unsold assets will be transferred to the FDIC. As has been said earlier, FDIC has no identification system for culturally significant resources and no plans to implement one.

⁶⁹[Anonymous], Project Manager, George Scientific, Inc., Alexandria, VA, telephone interview by author, 17 February 1994.

⁷⁰Hein.

⁷¹Conway.

Chapter 7

Mediator becomes litigant: The role of the NTHP in the Dr. Pepper case

Both the FDIC and RTC have consistently maintained that when they act to resolve bank or S&L failures, they are not federal agencies for purposes of Sections 106 and 110 of the National Historic Preservation Act. Furthermore, FDIC has never attempted to identify cultural resources under its control. The Section 106 issue was brought to the fore of FDIC's agenda by a lawsuit filed in May, 1993, by the National Trust for Historic Preservation in U.S. District Court in Washington, D.C., seeking to enforce the FDIC's compliance with the NHPA.

The Dr. Pepper Headquarters Building at 5523 East Mockingbird Lane in Dallas, Texas, was constructed from 1948 and served as the international headquarters for the Dr. Pepper Company until 1986. Today it is considered one of the finest examples of Art Moderne architecture in Texas and has been deemed eligible for listing in the National Register.

FDIC acquired the Dr. Pepper building in the course of liquidating the assets of the failed First Republic Bank of Texas.⁷² In March 1993, FDIC had negotiated the sale of the Dr. Pepper Building to DalMac Investment Corporation. Pursuant to the sale contract, and prior to closing, DalMac applied for a demolition permit for Dr. Pepper hours before the Dallas Landmark Commission was to hold a public hearing where it would consider designating the structure a landmark.⁷³

⁷²NationsBank of Texas was formed as the bridge bank to take over the assets and liabilities of First Republic Bank. Some of NationsBank's assets and liabilities were subsequently transferred to FDIC. Bridge banks may be set up and controlled by the FDIC but, by statute, they are not agencies of the federal government.

⁷³National Trust for Historic Preservation et al. v. Federal Deposit Insurance Corporation and Andrew C. Hove, Jr., Acting Chairman, Civil Action No. 93-904 IHG, Complaint for Injunctive and Declaratory Relief.

In the weeks which followed issuance of the demolition permit, the Texas Historical Commission, the National Trust for Historic Preservation, and the Advisory Council on Historic Preservation informed FDIC that, as a federal agency, it must comply with NHPA in mitigating adverse effects to National Register-eligible properties under its control. Clearly, demolition was an adverse effect.

In a letter to the National Trust, FDIC maintained that, when acting in its corporate capacity as liquidator of assets of failed financial institutions, it is not a federal agency and therefore not subject to NHPA. In its correspondence to the Advisory Council and the National Trust, FDIC “concede[d] agency status in its corporate capacity only when it functions as a regulator.”⁷⁴ “With respect to the NHPA, our position is that the Act does not apply to the FDIC in its capacity as the liquidator of assets of failed financial institutions. As liquidator, we do not serve as a federal agency; rather, by statute, we exercise the rights and fulfill the obligations of the failed bank.”⁷⁵

The National Trust brought suit to protect the interests of its members and member organizations “who use, enjoy, and derive benefit from the historic and cultural resource of the Dr. Pepper Headquarters Building.” In its complaint for injunctive and declaratory relief, the National Trust notes that Section 106 requires that federal agencies “take into account the effect of [federal or federally assisted] undertaking[s],” on historic properties and that responsibility for implementation of this review falls under the Advisory Council, an independent federal agency. Without question, FDIC is a federal agency, the Trust argued. Furthermore, it directly controls the disposition of the Dr.

⁷⁴Thomas A. Rose, Deputy General Counsel, FDIC, to Elizabeth S. Merritt, Acting General Counsel, NTHP, 27 April 1993. From pleadings file, NTHP v FDIC, NTHP, Washington, DC.

⁷⁵Andrew C. Hove, Jr., Acting Chairman, FDIC, to Congressman John Bryant, 15 April 1993. From pleadings file, NTHP v FDIC, NTHP, Washington, D.C.

Pepper Headquarters Building and, by statute, the transfer, lease, or sale of a historic property by a federal agency constitutes an undertaking.⁷⁶

The Trust's argument begins with NHPA and the Section 106 requirement that the Advisory Council be given opportunity to comment on any federal undertaking affecting a historic property. "Undertaking," as defined in NHPA and Advisory Council regulations, includes the sale of a property. (See Chapter 4.) By not consulting the Advisory Council to explore options and reach agreement on ways to avoid or mitigate adverse affects, FDIC failed to comply with NHPA. FDIC claimed no other version of these facts; for its part, it never intended to comply with NHPA.

"Contrary to the FDIC's assertions, nothing in the plain language or legislative history of either NHPA, the Financial Institutions Reform Recovery and Enforcement Act of 1989, or other federal banking laws indicates any intent by Congress to exempt the FDIC from its obligation to comply with the NHPA." The Trust argues Section 106 applies to all federal agencies having direct or indirect jurisdiction over an undertaking which could affect historic properties.⁷⁷

The Trust notes that in McMillan Park Committee v. National Capital Planning Commission, a 1991 case argued in the Washington, D.C. circuit, the court found the requirements of Section 106 not to be burdensome, costly, or time-consuming. The court found NHPA does not afford exceptional priority to historic preservation, but merely serves to integrate preservation goals into federal agency programs. The most common way Section 106 serves to mitigate adverse affects of an undertaking is to include preservation covenants in a property's deed.⁷⁸

⁷⁶NTHP v FDIC, Complaint.

⁷⁷NTHP v FDIC, "Plaintiffs' memorandum of points and authorities in support of their application for a temporary restraining order and motion for preliminary injunction," from pleadings file, NTHP v FDIC.

⁷⁸*Ibid.*

In response, FDIC never argued that it had met Section 106 of NHPA or that its actions with respect to Dr. Pepper are not the type normally subject to Section 106. FDIC simply restated its position: while it is sympathetic to preservation goals, FDIC is not a federal agency and not subject to NHPA when it acts as a corporate liquidator.

The Trust then attempted to establish the fact of FDIC agency status by noting NHPA's own cross-reference to the Administrative Procedure Act (APA) to define agency: "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include the Congress; the courts of the United States; the governments of the territories or possessions of the United States; the government of the District of Columbia..." thus not specifically exempting FDIC. In fact, nothing in federal banking law would indicate that FDIC is not a federal agency for purposes of NHPA.⁷⁹

The Trust went on to find the federal agency attributes of FDIC overwhelming: All members of FDIC's board of directors are government officials, FDIC is granted broad powers and considerable autonomy similar to other federal agencies, it must make an annual report to Congress on its enforcement activities, and its primary purpose is a federal interest--that is, implementing and enforcing a national banking policy.⁸⁰

FIRREA imposed many obligations on FDIC beyond the resolution of failed financial institutions. In several sections, FIRREA referenced federal laws designed to advance affordable housing policies and explicated how the sale of FDIC- or RTC-controlled homes to disadvantaged groups must proceed. Residential assets of failed banks falling under these regulations are hardly different from cultural resource assets falling under NHPA: FIRREA was saying, in effect, that Congress both acknowledges

⁷⁹Ibid.

⁸⁰Ibid.

the importance of the banking crisis clean-up, and requires that clean-up to take place in a context which recognizes other priorities as well.

In this case, FDIC was acting in its corporate capacity--not a receivership capacity. Since the courts normally do not have jurisdiction over liquidation of assets in receivership by FDIC, the Trust anticipated, for the sake of argument only, a potential ruling that the circuit court could not interfere in the sale of the Dr. Pepper building. The Trust noted that financial claims against receivership assets were, in fact, beyond the court's jurisdiction and precluded by federal banking law. The Trust submitted, however, that case law showed no jurisdictional bar to the court providing injunctive relief under NHPA where FDIC was acting in its corporate capacity.⁸¹

The Trust concluded its argument by citing the irreparable harm to its constituents which would be caused by the sale and demolition of the Dr. Pepper building, the greater severity of that harm when compared to that which would be suffered by FDIC if a restraining order were granted, and the public interest which would be served by such a restraining order. The Trust requested the court grant a temporary restraining order and preliminary injunction.⁸²

The defendant responded: "Plaintiff, as part of a continuing quixotic attempt to overcome an explicit Congressional bar against interference with FDIC's liquidation activities, seeks a temporary restraining order prohibiting the sale of the Dr. Pepper headquarters in Dallas, Texas," began the defendant's response.⁸³

Such contrasting arguments provide grist for our judicial system. A plaintiff says, "Your vicious dog bit my child." The defendant responds, "My dog didn't bite your

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ NTPH v FDIC, "Defendants' memorandum of points and authorities in opposition to Plaintiff's Application for Temporary Restraining Order," from pleadings file, NTHP v FDIC.

child; my dog is very friendly; my dog loves children; I do not have a dog.” So went FDIC’s line of reasoning.

FDIC reassured the Trust of its sensitivity to historic preservation concerns, but noted that FIRREA and federal banking laws prevented it from considering those concerns when liquidating assets. FDIC cited the same statutes as the Trust to argue the opposite point: FDIC submitted that the court did not have jurisdiction over assets transferred to FDIC in its corporate capacity as liquidator. It went on to argue that even if the court did have jurisdiction, “neither the terms of NHPA nor the intent of Congress in enacting the statute contemplate[d]” that the act would apply to FDIC as liquidator.⁸⁴

FDIC recommended the court deny a temporary restraining order because FDIC would incur substantial holding costs (a greater harm than demolition). “[M]ore importantly, its efforts to comply with its statutory mandate would be thwarted. Finally, public interest favors resolution of the banking crisis....The sale of such property is simply not a ‘federal undertaking’ by a ‘federal agency.’”⁸⁵

Although FDIC reiterated that no harm would come to the Dr. Pepper building while under its control, the statement was disingenuous. DalMac, the buyer, had already sought and been granted a demolition permit; it would have no trouble obtaining another one once the sale was completed. Recognizing this along with the Trust’s arguments, on May 7, 1993, the district court ordered that FDIC be “restrained and enjoined from selling, demolishing or otherwise disposing of the Dr. Pepper headquarters building without complying with the NHPA,” until the court’s hearing on May 14 to decide whether to issue a preliminary injunction.⁸⁶

⁸⁴Ibid.

⁸⁵Ibid.

⁸⁶NTHP v FDIC, “Memorandum and order,” 7 May 1993.

However, on May 14, the preliminary injunction, which would have prevented FDIC from completing the sale, was denied despite “a strong showing on the merits of the case....” The court stated in its order that it did not have jurisdiction and dismissed the case.⁸⁷ In doing so, Judge Harold Greene was acknowledging the probable applicability of NHPA but, based on federal banking law, no court can enjoin the FDIC to allow time for there to be a determination on the NHPA issue. Subsequent to Judge Greene’s denial of the motion for a preliminary injunction, the Trust filed an appeal with the District of Columbia Circuit. The Trust was granted an administrative stay to allow time for the court to render a decision. The Circuit Court ruled on May 28 that it would not grant an injunction to halt the sale of the Dr. Pepper building.

As it turns out, that “final” order was only the penultimate. The Trust filed a petition for a rehearing. On October 21, 1993, the same court ordered the May 28 judgment vacated and a petition for rehearing was granted.⁸⁸ The outcome of that rehearing is not yet known, however the petition for a rehearing does not prevent DalMac from demolishing the building. [See addendum and appendix.]

The National Trust’s involvement in taking on this case is unusual in that the Trust prefers to advance its preservation interests by serving as a mediator. Legal battles are expensive. However, a case with potential to set important precedent is worth pursuing and the Dr. Pepper case met that test.

The Dr. Pepper Headquarters Building still stands. It may stand for a very long time to come and, if it does, it may have little to do with its being “the finest example of Art Moderne architecture in Texas.” The Trust’s lawsuit and the work of its co-plaintiffs, Preservation Texas and the Dallas Historic Preservation League, have successfully

⁸⁷NTHP v FDIC, “Order,” 14 May 1993.

⁸⁸NTHP v FDIC, “Order,” 25 October 1993.

focused media attention on the Dr. Pepper Headquarters and are largely responsible for winning a temporary reprieve for the building. Their efforts have been substantially bolstered by a group whose primary concern is not historic preservation. DalMac wanted to raze Dr. Pepper to build a strip shopping center. The neighbors don't want the increased traffic that such an intensive use of the land would bring. They have been fighting the shopping center tooth and nail.⁸⁹

⁸⁹Alexandra E. Acosta, Assistant General Counsel, National Trust for Historic Preservation, interview by author, Washington, DC, 17 September 1993.

Chapter 8

Buildings saved, buildings lost: A few case studies from the local paper

Lynnewood Hall, Elkins Park, Cheltenham, Pennsylvania

Lynnewood Hall exemplifies some of the pitfalls of RTC real estate sales even when those involved intend to facilitate transfer to a preservation-minded buyer. RTC held a \$750,000 mortgage (including interest) on this historic Philadelphia area mansion. Although this was the largest of four mortgages on the property totaling \$1 million, the other three were held by other institutions. Since RTC did not control disposition of the entire property, it did not list Lynnewood Hall in the Special Resources Clearinghouse. Nevertheless, RTC bore the brunt of public outrage when Lynnewood Hall was threatened.

The former estate of Peter A.B. Widener in Elkins Park, Pennsylvania, Lynnewood Hall was designed in 1900 as a 110 room limestone mansion by Beaux Arts architect Horace Trumbauer. It was built on an original tract of 300 acres (now 36 acres) at a cost of \$8 million, and its design replicated a neoclassical house near Bath, England. The estate included fountains said to have rivaled Versailles, a working farm, stables, a power plant, and many outbuildings.

The Widener family has an illustrious history beginning with Peter Widener, the son of a butcher, who made a fortune selling meat to the Union Army during the Civil War. He expanded his wealth through later investments in real estate and street car lines. Descendants of Peter Widener donated the Widener Library at Harvard University. The notable art collection of Joseph Widener, which once hung in Lynnewood Hall, now hangs in the National Gallery of Art in Washington.

Faith Theological Seminary purchased Lynnewood Hall from the Widener family for less than \$200,000 in 1952, after Joseph Widener's death. To cope with worsening

finances, the Seminary had taken out several mortgages on the Hall in recent years while local officials expressed concern about apparent deterioration. In 1989, the Seminary sold the famous fountains for \$85,000 (today valued at \$2.5 million).⁹⁰ In 1992 and early 1993, the Seminary retained the New York dealer Elizabeth Street to sell off Lynnewood Hall's remaining architectural elements.

Although Lynnewood Hall's future had been uncertain for some time, it took an advertisement in the January, 1993, issue of Antiques magazine to galvanize public support to save the mansion. The five-page color ad had been placed by the New York dealer and offered all internal and external architectural elements for sale--including paneling, fountains, ornamental plaster, glass, decorative metal, and even the entire limestone facade. The 250-member Friends of Lynnewood Hall coalesced practically overnight and set out to collect 5,000 signatures on a petition to stop the destructive disassemblage. In a rare instance of cooperation to protect its own collateral interests in the property, RTC successfully sought a temporary restraining order to halt Elizabeth Street's activities.⁹¹

On January 8, 1993, representatives of the National Trust for Historic Preservation, with state and local officials, toured the house. In consultation with the RTC, alternatives for protecting the property were explored.⁹² Over ensuing months, public interest to save the mansion swelled. Congresswoman Marjorie Mezvinsky took on the crusade with particular fervor. The RTC removed Lynnewood Hall from the auction block, and headlines in Philadelphia area publications were frequent and widespread. Preservationists were working as much to save Lynnewood Hall from its

⁹⁰Gersil N. Kay, "Hope for a great house at the brink," The Philadelphia Inquirer, 29 August 1993.

⁹¹*Ibid.*

⁹²National Trust for Historic Preservation, Mid-Atlantic Regional Office, Philadelphia, news release, 8 January, 1993.

destructive present owner as from the prospect that RTC might locate a similarly insensitive buyer.

“The Resolution Trust Corporation and the National Trust for Historic Preservation today agreed to work together to find a preservation-minded buyer for the RTC’s financial interest in Lynnewood Hall,” began an RTC news release from April 22, 1993. It continued, “As part of this agreement, the Trust has committed itself to purchase the RTC’s asset or to locate an acceptable acquirer by July 5, 1993.”⁹³ The RTC understood that the Trust never intended to actually acquire the property. The Trust expected the RTC to foreclose on the it and, in the meantime, the Trust would find a sensitive buyer to make a successful bid for the estate at auction.

On May 12, a federal judge made permanent a court order preventing the Rev. Carl McIntire, leader of the Faith Theological Seminary, from selling off parts of building while the mortgages were in litigation. At the same time, U.S. District Judge John P. Fullam criticized preservationists and the RTC for interfering with the sale of private property.

In the early months of 1993, when local advocates and the regional and national offices of the Trust were frantically seeking a buyer, a philanthropist stepped forward. The Trust found a Philadelphia dentist/entrepreneur and native of India, Dr. P.G. Patel, who wished to purchase the mansion and finance its restoration. The Trust’s legal department coordinated arrangements for Patel to bid at an upcoming auction of Lynnewood Hall’s RTC-held mortgage. The Trust and local preservation groups knew that the Seminary potentially could pay off the mortgage and thus thwart Patel’s acquisition, but they had little reason to believe Patel would not be the successful bidder.

⁹³Resolution Trust Corporation, Washington, D.C., news release, “RTC, National Trust sign agreement on Lynnewood Hall,” 22 April 1993.

In the end, however, the private property rights of Rev. McIntire's Faith Theological Seminary will determine the fate of Lynnewood Hall. The laws governing foreclosure are designed to protect the mortgagor's interests. When an auction scheduled for April was delayed, Rev. McIntire, then 86, worked through his church to reorganize the Seminary's finances and keep the property. By the Fall of 1993, McIntire succeeded and Patel never had the opportunity to follow through on his philanthropic promise. Lacking strong local preservation ordinances, Faith Theological Seminary may, if it chooses, continue to sell off pieces of the famous Widener mansion.

Halcyon Hall and Chapel, Millbrook, New York

As the National Trust scrambled to save Lynnewood Hall, it was simultaneously working to protect Halcyon Hall in Millbrook, New York, from sale by the FDIC.

Designed by James E. Ware as a luxury hotel, Halcyon Hall was built in 1893 by H.J. Davidson Jr., and is today considered one of the finest examples of Queen Anne and shingle-style architecture in the state. In 1907 Halcyon Hall was enlarged and became the Bennett School, later to become Bennett College. Bennett College closed in 1978; after a subsequent owner/developer defaulted, the property became the responsibility of FDIC when the mortgage-holder, Mechanics and Farmers Bank (Bridgeport, Connecticut), failed.⁹⁴

Local groups determined to preserve Halcyon Hall intact had organized before the bank failed and before FDIC became involved. These groups had succeeded in nominating Halcyon Hall to the New York Register of Historic Places and, at the point of FDIC's involvement, were pursuing a nomination to the National Register. FDIC opposed the National Register nomination and Friends of Halcyon Hall filed suit, with

⁹⁴National Trust for Historic Preservation, Washington, D.C., news release, "Settlement provides protection for historic Halcyon Hall," 30 July 1993.

assistance from the National Trust, arguing that FDIC's objection violated Section 110A of the National Historic Preservation Act. FDIC claimed that Section 110, requiring federal agencies that control or own properties listed or eligible for listing in the National Register take steps to protect those properties, did not apply to them.⁹⁵

The National Trust announced a settlement in the lawsuit on July 30, 1993. The deal called for listing the property on the National Register and giving Friends of Halcyon Hall and the National Trust nine months to market and sell the property with binding historic preservation covenants. As part of the settlement, the preservation organizations may not comment on the marketing of the property except in written statements approved by FDIC.⁹⁶ As of this writing, Halcyon Hall is still for sale, and the marketing period extended, because repairs mandated by the terms of the settlement have not yet been completed by FDIC.

Like the RTC negotiations by the National Trust and Friends of Lynnewood Hall, public pressure reaped significant concessions from the FDIC in the case of Halcyon Hall. The outcome of this old hotel's disposition is still unknown, but the unpredictable turn of events in the sale of Lynnewood Hall does not reflect properly an otherwise strong preservation battle. Given the traditionally hostile attitude of the FDIC toward historic preservation, Halcyon Hall may well turn out to be an unlikely and unmitigated success.

1115 Wurzbach Road, San Antonio, Texas

The Wurzbach site holds intrigue: An overgrown, mostly vacant fifteen acre lot in the middle of the city of San Antonio had somehow escaped the attention of almost everyone--including developers. Few entered its Addams-Family-esque grounds, but

⁹⁵Ibid.

⁹⁶John Davis, "Halcyon Hall deal set, building makes historic register," Millbrook Round Table, Millbrook, New York, 5 August 1993, pp. A1, A11.

those who did knew of a most unusual collection of 20th century concrete architecture and sculpture by superb craftsman and Mexican artist Dionicio Rodriguez.

Rodriguez worked primarily in the United States from the 1920s to 1940s in a style based on a folk art tradition known as *el trabajo rustico* (rustic work), similar to the that popularized by the National Park Service in the same period. Known for his artistic skill and very high quality of craftsmanship, the collection at 11115 Wurzbach is the largest known outside Brackenridge Park, also in San Antonio.⁹⁷

RTC had listed 11115 Wurzbach as vacant land. Indeed, with buildings and sculpture set back from the street several hundred feet, the structures remained largely unnoticed. On the 15.54 acres is the second-largest collection of Rodriguez' sculpture, whose work is scattered across seven states, from Maryland to New Mexico, and his native Mexico. The buildings and sculptures were commissioned by a founder of the San Antonio Zoological Gardens and some served as cages to hold imported exotic animals.

A log-form fountain built by Rodriguez with cascading pools of water and a perched peacock marks the approach to the property. Paths cross the grounds, taking the form of rough hewn logs. They are marked by the raised grain of unfinished wood worn by treading human feet. Railings on bridges over man-made rivulets were constructed as if out of twisted vines. Meticulous details on the garage and house frame each window and door with perfect tree specimens from the forest, bark intact, pecked by birds in search of insects. Cages were formed of hollowed tree stumps, as if the centers had rotted away and holes for light and air had naturally opened where limbs had fallen. All of this was a conceit; virtually no wood was used. The sculptural, architectural, naturalistic forms were made almost entirely of stained, reinforced concrete.

⁹⁷James E. Bruseh, Ph.D., Deputy State Historic Preservation Officer, Texas Historical Commission, et al., to Bob Tanner, First Gibraltar Realty, re: 11115 Wurzbach, 9 March 1993. ACHP files, Washington, DC.

A several-year resident of the property notified the Texas Historical Commission of the Rodriguez works. RTC had been trying to evict the tenant in preparation for sale to a housing developer. Upon visiting Wurzbach and confirming its significance, the Texas Historical Commission pursued National Register nominations and sought covenants to assure permanent protection of all pre-1950 buildings, structures, and archaeological sites.⁹⁸ The Commission believed the most appropriate use for the site would be as a public park, however it made clear that its primary concern was preservation of the historic resources present.⁹⁹

Through the involvement of the Trust for Public Lands (New Mexico), the San Antonio Conservation Society, and the Texas Historical Commission, an agreement with RTC asset manager Robert Tanner and his prospective buyer was reached. The “Historic Preservation Agreement” put forward in a July 27, 1993, letter from the Texas Historical Commission was a compromise, but it was a compromise the Commission could live with.¹⁰⁰

The easement between the Texas Historical Commission and Peter M. Wolverton, the buyer, protects for a period of twenty years 1.0 acre of the 15.5 acre site. That acre includes most structures designed by Rodriguez: the residence, a garage structure, animal holding structures made of concrete, pavilion, and a bridge structure.¹⁰¹

If this is a success story, as those involved believe, it is one with significant limitations. A fifteen acre buffer had afforded Wurzbach a park-like setting in developed northwest San Antonio. When multi-family housing is built on the unprotected 14.5 acres, as is expected, all that will remain of the wooded rustic lot is a hole in a donut--a

⁹⁸Bruseth

⁹⁹Teresa Kinsey, Project Coordinator, Texas Historical Commission, to Sharon Conway, Advisory Council on Historic Preservation, re: 11115 Wurzbach, 24 March 1993, and 12 accompanying photographs. ACHP files, Washington, DC.

¹⁰⁰Teresa Kinsey to Robert Tanner, re: 11115 Wurzbach, with Historic Preservation Agreement [easement] attached, 27 July 1993. ACHP files, Washington, DC.

¹⁰¹Ibid.

hole filled with some of the most unusual concrete sculpture of the 20th century. And the hole is only protected from consumption for twenty years when, one assumes, the next preservation battle will be waged.

Casa Fiesta Trailer Park, Tempe, Arizona

Casa Fiesta Trailer Park consists of 38 acres of lightly developed land near Tempe, Arizona. Over a long prehistoric period, corresponding approximately to 8700 through 1200 B.C., this land formed part of an important Native American Hohokum village known as Los Hornos. Four present-day Southern Arizona tribes consider themselves descendants of the Hohokum: the Gila River Indian Community, the Salt River Pima-Maracopa Indian Community, the Ak-Chin Indian Community and the Pohnono O’Odham. Hopi Indians also believe they have ancestral ties to the Hohokum.¹⁰²

Non-systematic archaeological testing in the late 1980s uncovered Hohokum burials at Casa Fiesta. While the total number of burials is unknown, educated estimates place the number at more than fifty (and perhaps substantially more than that). The only previous developed use of this site has been as a trailer park. The use caused minimal disturbance, confined primarily to the portion where trailer pads and roads were located.

The mortgage to Casa Fiesta Trailer Park was held by an Arizona savings and loan which failed, thus placing control of the property’s disposition with the RTC. Casa Fiesta was first offered for sale by RTC in early 1992. The Arizona SHPO learned of its availability and initiated efforts to find a buyer sympathetic to its important archaeological resources. In meetings held with RTC and the asset manager responsible for Casa Fiesta’s sale, RTC said repeatedly that it was not a federal agency and not subject to NHPA or Section 106 review. RTC said, however, that it was “sympathetic” to

¹⁰²The Casa Fiesta case study is based on a telephone interview with Robert Gasser, Historic Preservation Specialist, Arizona State Parks, Phoenix, Arizona, by the author, 24 January 1994.

the special resources present and that it would give appropriate consideration to a prospective developer willing to undertake archaeological excavations.

In communications pre-dating the Casa Fiesta Trailer Park issue, Bob Gasser, of the Arizona State Historic Preservation Office, indicated to RTC that his office would treat sales of RTC cultural resource properties much less stringently than other government undertakings. This arrangement was not unusual; without a court ruling finding Section 106 applicable, no legal hooks existed to enforce traditional standards. In his communications, Gasser had agreed to concentrate only on sites of extreme significance. Out of several thousand RTC properties in Arizona, his office chose to focus its efforts on three. Casa Fiesta was one of them.

Several potential buyers came forward: one intended to continue Casa Fiesta as a trailer park, another wanted to build apartments but was willing to comply with the Archaeological Conservancy (Santa Fe) which requested the permanent setting aside of the ten most archaeologically important acres. Through diligent work, Gasser found a buyer who wished to develop the land sensitively and was willing to pay for archaeological excavations and data recovery. RTC confirmed that it would give that buyer due consideration for his archaeology expenses.

“We held lots and lots of meetings and it was a big waste of time,” said Mr. Gasser. After arduous negotiations to assist transfer to the chosen developer, RTC sold Casa Fiesta to the highest bidder with no protective covenants and no expressed intentions to properly excavate and recover data. The buyer was Earnest L. Thesman of E. T. Consultants in Los Angeles. Thesman purchased Casa Fiesta in August, 1993, and intended to develop the site into townhouse condominiums.

Gasser’s office informed Mr. Thesman that Casa Fiesta contains the buried remains of the prehistoric Hohokum village known as Los Hornos. Mr. Thesman was further informed that Arizona state law A.R.S. 41-865 requires appropriate consideration

and treatment of human remains on private land in Arizona, violation of which can result in a felony conviction. Under threat of lawsuit, the developer complied with the minimum requirements of the law: he consulted the Arizona State Museum. Through this consultation, he was merely obligated to devise a plan to turn over any uncovered human remains to the appropriate present-day tribe so they may treat them according to their customs and wishes. Casa Fiesta and any stories it may have held about the prehistoric peoples of present-day Arizona are expected to be lost forever.

Recalling his unsuccessful battle, Gasser was clearly demoralized by the events. He felt that his work to save Casa Fiesta was in vain, and he expressed frustration at his inability to gain a single concession from RTC. He had placed all his efforts in three Arizona sites, and was not even able to hold RTC to its word in giving the buyer a moderate price break.

Mr. Gasser noted the difficulty of rallying public interest around archaeological sites in general. Unlike historic buildings, or even environmentally sensitive lands, at archaeological sites there is often nothing to see except dirt. Preservation success often hinges on strong public outcry. The one hook at archaeological sites which arouses interest of Arizona preservation groups and Native American tribes is an indication of buried human remains. In this case, even that was not sufficiently compelling.

PSFS Building Executive Suite Furnishings, Philadelphia

Architectural historians consider the Philadelphia Savings Fund Society building to be one of the most significant early modern skyscrapers: Structurally and decoratively innovative when it was built in 1932, today PSFS is recognized as having codified a developing International Style in America and it is credited with laying foundations for great skyscrapers which followed. In their modern design, architects Howe and Lescaze moved the traditional banking room to the second floor and--unique for the time--

incorporated central air conditioning and dropped ceilings throughout. The PSFS building is now a National Historic Landmark.

Interior art moderne furnishings were designed by the architects and considered integral to the building. The most resplendent of these interiors was the 33rd floor penthouse which included a boardroom, executive dining room, and solarium. When the Philadelphia Savings Fund Society became insolvent, FDIC was responsible for paying depositors and minimizing losses by selling the bank's assets. FDIC, aware of the 33rd floor furnishings' value, removed them in March, 1993, for auction.

Most of PSFS's assets were sold to Mellon PSFS, which had earlier acquired the right to use the PSFS name. Mellon PSFS continues to operate a branch in the second floor banking room which, along with the former Girard Trust also owned by Mellon PSFS, is one of the two grandest banking rooms in Philadelphia. Mellon PSFS did not acquire the PSFS building and the bank does not occupy any of the building's office space. Therefore, even if FDIC restored the furniture to the executive suite, questions remain: What purpose would the penthouse serve and who would maintain it?

The fate of the PSFS building itself is tied up in a knotted series of sales and leases to holding companies, junk bond investors, and tenants. Although at one time it was considered thoroughly modern, it is now thoroughly outdated when compared to other office space. The building requires substantial upgrading of mechanical systems in order to command prices appropriate to its prime location.

When FDIC removed the furniture to storage, Alan Rouse, FDIC's liquidator in charge, was deluged with phone calls from concerned preservationists. "It looks like we stepped on a land mine," he said in the Philadelphia Inquirer. FDIC was clearly surprised by the public reaction to a proposed sale and, as a result, FDIC delayed any planned

auction. It donated some pieces to the Hagley Museum in Delaware, along with the original building documents; the rest remain in storage.¹⁰³

Ordinarily, furniture is not considered part of a building, and interiors are generally not protected even in National Historic Landmarks. But the PSFS executive suite is an unusual case. While the chrome and leather “ocean liner-style” furniture is in storage, the rest of the 33rd floor interiors have not been touched. They include sliding walls of ebony and walnut, Cartier clocks, and custom-designed stainless hooks for the directors’ hats and coats.

Meanwhile, purchase from FDIC is being negotiated by Preservation Pennsylvania which hopes to return the furnishings to the 33rd floor with protective covenants for any new owner of the building.¹⁰⁴

¹⁰³Thomas Hine, “PSFS suite is just a memory,” The Philadelphia Inquirer, 12 March 1993, B3.

¹⁰⁴Anne Elizabeth Powell, ed., “Short takes: Preservationists work to save PSFS furnishings,” Historic Preservation News, October/November 1993, p. 5.

Chapter 9

Stop, look, and listen

The Dr. Pepper Headquarters Building case will set an important precedent, whatever its outcome. A ruling that NHPA applies when FDIC liquidates assets in its corporate capacity could entirely change the course of this issue. A similar outcome could be achieved if Congress were to enact new, tighter legislation which addressed the protection of cultural resources under FDIC or RTC control.

Since the FDIC is a permanent institution, the battle for NHPA compliance will have to be waged in the courts. Congress is unlikely to tamper with this self-funded agency. RTC is a temporary agency and therefore lawsuits or new legislation can only serve a limited purpose. Congress neglected to take advantage of regulatory opportunities to protect cultural resources when it was addressing the extension of RTC funding on several occasions. RTC continues only to identify those resources. Although new congressional mandates, unlikely as they may be, could compel FDIC and RTC to comply with NHPA, such pressure would come too late for RTC.

Congress' silence on the issue of protection has been taken by RTC and FDIC to mean that their first priority in liquidations must be to seek the highest possible price for all assets. Indeed, in FIRREA Congress did not write a conclusive policy on protection of special resources and likely equated "public benefit" with "protection of the taxpayer." At the same time, Congress granted neither RTC nor FDIC specific exemption from NHPA.

With the National Historic Preservation Act as the only available tool, and one which has proved ineffective in this situation, how does one protect cultural resources under transitory control of these two agencies? In the absence of regulation, grass-roots efforts will play a very important role. As long as RTC and FDIC continue to submit, on

occasion, to extraordinary public pressure, traditional preservation approaches bear revisiting.

State and regional preservation organizations, both public and private, have historically been the working army in advancing the preservation agenda. Their grass-roots actions will continue to be pivotal in protecting important cultural resources embroiled in the banking and S&L clean-up. During this crisis, they have served to: identify, evaluate, and market potentially threatened properties; focus media attention; build a preservation real estate market through private, private non-profit, and government buyer networks; and, perhaps most importantly, provide win-win examples to parties on both sides of the issue. Nevertheless, especially in light of the Lynnewood Hall and Casa Fiesta case studies, preservationists must allocate their limited resources carefully. In each of these unsuccessful examples, great effort was expended to find buyers for individual properties.

Practical protective measures

Following a lead from environmentalists and the Texas Center for Policy Studies, preservationists can take a more pro-active role in identifying cultural resources. To do this, preservationists could target areas likely to have a large number of culturally significant buildings or sites and a high concentration of RTC-owned property. By taking the early initiative to survey areas with a high probability for the presence of cultural resources (such as New England and New Orleans for architecture, or the Southwest for archaeological sites), some could be identified before the asset managers' assessments. Advance information and warning allow time to mobilize money and troops. When preservationists stay up-to-date on failures of local financial institutions, use their turf familiarity, and tap local networks of real estate agents, they can gain an important head start.

The “people network” is critical. Insiders frequently have information long before the agency or the public. Personal contacts, landlord and property owner records, tax records, and access to sophisticated databases can be invaluable. Insiders also know how to work the asset disposition system most efficiently. For example, potential buyers of any property will face different obstacles depending upon ownership: RTC, FDIC, S&Ls in conservatorship, and banks in conservatorship all behave differently. Furthermore, while complete information on an FDIC asset will be available from the regional FDIC office nearest the property, such information on RTC assets is only available from the RTC regional office nearest the failed S&L--that could be thousands of miles from the property itself.

What does all this information and networking buy? It buys time. Since protecting special resources requires money, a shortage of lead-time for adequate fundraising usually presents the biggest obstacle. There are still preservation organizations who do not even know RTC publishes the Special Resources Clearinghouse--that they can have it mailed to them free of charge and that it is probably available in their library.

The only way to *assure* permanent protection of an important cultural resource is for a preservation organization or agency to buy the property outright or to ensure a sale subject to covenants or easements held by such an organization. Typically, a property is purchased by auction, sealed bid, or through a private asset manager. If purchased from an asset manager, savvy price negotiation is important. The manager should be made to understand any economic arguments and preservation laws favoring the sale. Non-profit preservation groups would also qualify for donations of historic properties, however the opportunities are slim at best. FDIC has no official donation policy and RTC will only consider for donation near-worthless properties. (For the RTC, this means properties with a net realizable value of under \$5,000.) Even when a preservation buyer can only afford

to make a very low offer, sometimes, in the absence of other bids, it will be accepted simply because RTC and FDIC are under great pressure to show cash flow.¹⁰⁵

Preservationists should also never underestimate the persuasive power of the media and elected officials--and the power of the media to influence elected officials. Media pressure need not always be negative. For RTC's and FDIC's parts, lifting and burnishing their images in the eyes of the public might be incentive enough for them to cooperate with preservation objectives.

Mike Hein reports that because too many preservationists and conservationists don't know how RTC works, their hasty actions can backfire. For example, concerned citizens often call the RTC in a state of alarm over a threatened property, insisting that RTC remove the asset from any planned auction. RTC frequently cooperates with such requests. However, if the public interest group representing those concerned citizens then enters negotiation to purchase the property, RTC must begin negotiation based on the appraised value of the asset. In this situation, the buyer may end up paying *two to three times* the price the asset would have fetched at a public auction. It should be noted that in the unusual and well-organized case of Lynnewood Hall, preservation groups and the RTC cooperated to remove the property from the auction pool and later re-schedule it for auction in order to allow Dr. Patel to bid.

Responding to the suggestion that most preservation and conservation efforts are reactive (rather than pro-active)--cases where the squeaky wheel gets the oil--Hein noted, from RTC's perspective, "If it [a preservationist] squeaks, we'll oil it." It is unfortunate that a preservationist's insistence that a property be removed from an auction could have the unintended effect of raising its purchase price.¹⁰⁶

¹⁰⁵Frederick and Baker, pp. 25-33.

¹⁰⁶Hein, telephone interview by author, 18 February 1994.

Preservation easements are the most prevalent means of protecting historic resources, other than outright purchase. However, as the case studies demonstrate, RTC and FDIC are loathe to negotiate such easements because they believe easements and covenants necessarily lower an asset's realizable value. Purchasing the desired easements can prove too costly in many situations. A private buyer, however, can receive a tax deduction by donating an easement to a not-for-profit [501(c)(3)] preservation organization.

As noted earlier, preservationists are frequently frustrated to find that RTC controls only a partial interest in a threatened resource. One problem that arises is that such properties are not listed in the Special Resources Clearinghouse. In theory, and given sufficient information to know about any threat to an asset, this "partial interest" could provide preservation leverage. RTC often has a hard time selling partial interests and so they can often be purchased at a reduced price. A preservation organization could negotiate an easement from a financially strapped mortgagor by purchasing the mortgage and releasing the debt. This would require a strong organizational effort, but less cash than purchasing the asset outright. There are no known examples of such an exchange.

Any strategy to protect cultural resources which have fallen into the unwelcoming hands of the RTC and FDIC must begin by acknowledging differences when compared to the sale or disposition of other surplus assets by the federal government. RTC and FDIC never had any interest in acquiring or using these properties. They see their mandate for this collection of real estate, encompassing the broadest conceivable range in type and geographical distribution, as recouping as much money as possible, as quickly as possible. By every standard, the events which precipitated the acquisitions and the need to expedite their sale constitute a crisis; that crisis has ramifications at all levels of the

economy. As the S&L bailout nears resolution in 1994, any urgency to settle cultural resource disposition policies will subside.

Without the banking and S&L crisis, this issue might never have been raised; certainly it would not have been the subject of a thesis in historic preservation. That does not mean that the operations of FDIC and FSLIC (RTC's predecessor) did not affect cultural resource disposition before the crisis. They did. But with fewer insolvent financial institutions, their actions affected fewer properties.

Nevertheless, though unprecedented in magnitude, the natural resource and cultural resource effects of this clean-up are not unique. The closing of large numbers of military bases will dramatically affect local economies and cultural resources. A closer parallel can be found in the Farmer's Home Administration. That agency ended up with thousands of farms repossessed in the early 1980s, posing potential development pressure to large tracts of sensitive land. As in the banking and S&L crisis, the properties were not acquired for a government use. In a memorandum of understanding between the Farmer's Home Administration and the Fish and Wildlife Service (FWS), before a property was sold, FWS assessed any threats to natural resources. If warranted, FWS recommended protective covenants or transfer to a park or wildlife management agency.¹⁰⁷

Recognizing that RTC or FDIC control of a property is temporary and transitional, bridging a transfer from one private owner to another, that temporary federal involvement remains the potentially fortuitous hook. In the face of oppositionist policies, strong public support can protect a small number of very significant cultural resources which otherwise would never have passed through government ownership. Specific legal arguments of the Dr. Pepper Headquarters Building and other case studies aside, one would be hard pressed to make an argument that sale of a National Register-eligible property by FDIC or RTC is not a *federally assisted* undertaking. In federally assisted

¹⁰⁷Frederick and Baker, p. 18.

actions, in the absence of specific exemption, Section 106 of the National Historic Preservation Act applies. If that is true, why do so many disputes arise?

Americans attach great importance to private property rights, despite the long history of government regulation of private property. Many Americans also believe, as a corollary, that the private sector will work faster and more efficiently to protect the interests of the average taxpayer. But this view fails to recognize the complexity of legislation and the multiple priorities of American society.

The federal government is inherently involved in the creation of value in private property and its programs are often designed to serve many objectives--often disparate, sometimes competing. When previously privately-held assets flow through federal agencies, as happened in great numbers during the banking and S&L crisis, it presents market threats, crisis management problems, and a few small windows of opportunity.

Federal programs are not ordinarily designed to work in the most expedient manner. As a society, we have given a certain level of priority to helping poor people own their own homes. We have assigned priority to protecting environmentally significant lands. And to protecting architecture significant to American history and culture. That is not to say we have elevated any one of these goals above all others. We have simply created programs to assure these interests are given due consideration.

Resolving the crisis created when large numbers of financial institutions fail is a priority as well. Few would question that assuring its speedy resolution and maintaining the stability of the U.S. economy takes precedence over many other well-intended goals. The question is one of degree.

When Congress enacted the National Historic Preservation Act it recognized that destruction of America's historic resources in the name of progress came at a cost. Cleaning up the banking crisis comes at a cost as well--hundreds of billions of dollars. But the number of culturally significant resources in question is relatively few, and courts

have recognized time and again that the review imposed by Section 106 of NHPA is not overly burdensome, that it is a “stop, look, and listen” mandate. Many Americans say that while they are footing the bill for this extraordinary bailout, it is fitting that we use the occasion to save some of the most important historic resources threatened by the crisis. Future generations will continue to pay for this debacle they did not create; a few protected buildings can be their dividend. Perhaps the problem is that not enough Americans take this view.

Some blame for inadequate attention to “special resources” can be attributed to crisis management ill-equipped to handle so many competing interests. Historically, much of the work to save historic buildings, as well as environmentally sensitive lands, has come from grass-roots efforts. It took time for preservationists to mobilize to protect their interests and to learn how to work with RTC and FDIC bureaucracies. In learning how to do so, they took lessons from environmentalists. The Nature Conservancy and the Sierra Club frequently participated as “friends of the court” in cultural resource disposition cases.

Yet there have been few successes to speak of in this struggle--one which is expiring on all sides, as the RTC gets ready to close up shop and the Advisory Council plans to terminate its resource identification services due to lack of results. As the chapters on the environmental movement and historic preservation case studies show, success invariably depends upon a squeaky wheel and a ground swell of public pressure. For very significant buildings, such support arises almost automatically. For archaeological sites, almost never.

The best deal, and the greatest potential for protection of a threatened resource, goes to the preservationist who can make the most compelling political and economic argument to the asset’s owner and to the public. In 1990, seventy-six percent of all

Americans described themselves as environmentalists.¹⁰⁸ Query: What percentage of Americans today describe themselves as historic preservationists?

¹⁰⁸Joel Garreau, Edge City, (New York: Doubleday, 1991), p. 526. [Originally published in "Harper's Index," Harper's magazine, January, 1990.]

Appendix A

RTC Directive 10100.43



DIRECTIVE SYSTEM

TYPE AND NUMBER

Circular 10100.43

CONTACT

Michael Hein

TELEPHONE

202-416-2122

DATE

February 3, 1993

DATE OF CANCELLATION (Bulletins only)

TO: Office Vice Presidents and General Managers,
Sales Center Directors/Coordinators, Managing Agents,
Field Site Managers, and SAMDA Contractors

FROM: Lamar C. Kelly, Jr.
Senior Vice President
Division of Asset Management and Sales

SUBJECT: Identification of Cultural Resources on RTC Assets

1. Purpose. To implement the Resolution Trust Corporation's (RTC) identification procedures with the Advisory Council on Historic Preservation (ACHP) to identify archaeological resources and historic buildings, structures, or sites (hereinafter referred to as "cultural resources") located on assets under the jurisdiction of the RTC.

2. References. To expedite identifying documents referred to in this directive, the following list of references is provided.

a. Asset Management and Disposition Manual (RTC Manual 10100.1), dated January 23, 1992.

b. Environmental Guidelines and Procedures (RTC Manual 10100.3), dated September 17, 1990 (hereinafter referred to as the "Guidelines").

c. RTC Circular 10100.15, "Identification of Special Environmental Resources Located on Real Property Assets," dated May 6, 1992.

d. RTC Memorandum 92-AMSD-0136, dated October 20, 1992, subject: Environmental Initiatives.

e. RTC Circular 10100.40, "RTC Special Resources Clearinghouse," dated October 22, 1992.

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RTC 1212/01(11-92)

3. Revision. This directive revises the Checklist Selection Form and Checklist N entitled "Archaeological Resources," in RTC Manual 10100.3.

4. Supplementation. This directive supplements the Exhibits contained in Chapter VII entitled "Environmental Policy," of RTC Manual 10100.1.

5. Scope. This directive applies to Field and Satellite Offices, Sales Centers, Capital Markets, conservatorships and receiverships, and RTC asset management contractors. The policy and procedures established herein will be followed in the management, marketing, and disposition of real property assets under the jurisdiction of the RTC, and non-performing loans secured by real estate that are 90 days delinquent. The policy and procedures also apply to subsidiary-owned assets and to assets in which the RTC is a participant.

However, the cultural resource review procedures contained in paragraph 9a, below, do not apply to RTC assets that have been previously reviewed prior to the effective date of this directive in accordance with the Guidelines and RTC Circular 10100.15, as reflected by documentation in the asset file indicating that a determination has already been made by the State Historic Preservation Officer (SHPO).

4. General Information

a. RTC Environmental Guidelines and Procedures. The Guidelines require that real property and certain real estate security be reviewed to determine the possible presence of special resources (as defined in Attachment A to RTC Circular 10100.15), and include cultural resources.

(1) For those assets that do not have the Checklist(s) completed, and without first completing the Checklist process, Phase I environmental site assessments are required for certain categories of assets in accordance with RTC Memorandum 92-AMSD-0136.

(2) When the results of the Guidelines' Checklist(s) or the preliminary results of an environmental site assessment show that a potential exists for the presence of a special resource, the Guidelines require that agencies and organizations with

appropriate expertise be contacted to confirm the presence of the special resource(s).

(3) If this process results in the identification of a special resource on a real property asset, the Guidelines further require that public and private conservation agencies and organizations be notified of RTC properties with confirmed special resources and be provided an opportunity to acquire such properties.

(4) These notifications are to be implemented as early in the property marketing and disposition process as possible, and in accordance with the policy and procedures contained in RTC Circular 10100.40.

b. Agreement with the Advisory Council on Historic Preservation. To assist in implementing the Guidelines, the RTC has executed an agreement with the ACHP for the identification of cultural resources on assets under the jurisdiction of the RTC. Implementation of this agreement will depend upon the submission of information on an asset's location and physical characteristics to the ACHP, including photographs and a map. Paragraph 9a, below, provides the procedures for contacting the ACHP for the identification of cultural resources on RTC assets.

(1) The ACHP will distribute the information on RTC assets to the appropriate SHPO or other subcontractor, so that the asset locations can be compared to existing data in the State Historic Preservation Office.

(2) When necessary, the SHPO, or his/her designee, will perform a site visit to make a determination of the presence or absence of a cultural resource.

(3) The RTC in Washington, D.C. will be invoiced directly by the ACHP for services performed under the agreement.

(4) Within 20 days the requesting party should receive a report from the SHPO, or his/her designee, indicating whether or not a particular RTC asset has cultural resources.

(5) Whenever the SHPO renders a report which confirms the presence of a cultural resource on an RTC property, the SHPO

will notify interested agencies and organizations of these confirmed properties.

(6) However, for all assets submitted to the ACHP, Asset Managers and Sales Center and Capital Markets personnel (hereinafter referred to as "RTC staff") will continue to be responsible for the following:

(a) identification of all other types of special resources on the asset (e.g., undeveloped floodplains, wetlands, recreational areas, etc.) in accordance with RTC Circular 10100.15, and

(b) notifying the RTC Special Resources Clearinghouse of all properties with confirmed special resources, including cultural resources, in accordance with RTC Circular 10100.40.

Further requirements may also apply depending on the type of special resource(s) and the law (e.g., the Coastal Barrier Improvement Act).

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c. Computerized List of RTC Properties Already Provided to the ACHP. When the agreement with the ACHP was executed a computerized list of certain RTC properties contained in the Real Estate Owned Management System (REOMS) database was provided to the ACHP for review by the SHPOs, or their designees. This initial list includes RTC properties that contain either structures identified in REOMS as being 50 years of age or older, are categorized as land over one acre in size, or contain structures for which the year built is unknown.

(1) Shortly after the effective date of this directive, the SHPOs, or their designees, will contact the Asset Manager or RTC staff responsible for these properties with the results of their initial review, including requests for additional locational or descriptive information.

(2) The results of the initial review provided by the SHPOs, or their designees, will identify those RTC properties which contain a cultural resource, verify the presence of a cultural resource on RTC properties already identified in REOMS as having a cultural resource, and identify RTC properties for

which additional information is needed to determine whether or not a cultural resource is present.

(3) Paragraph 9b, below, provides the procedures for responding to the findings of the SHPOs, or their designees.

(4) If additional information is requested for properties on the computerized list provided to the ACHP, Asset Managers or RTC staff responsible for these properties shall respond to the SHPOs, or their designees, as follows:

(a) Sold Properties. If the sale of a property has been closed, the SHPO, or his/her designee, will be advised that the property has been sold and no further action is required.

(b) Unsold Properties. If the sale of a property has not closed, the Asset Manager or RTC staff responsible for the property shall respond to the SHPO, or his/her designee, as follows:

1. submit the results of the Checklist process or the applicable sections of a Phase I environmental site assessment, and any other supporting documentation for the RTC's cultural resource determination; or

2. submit information to the ACHP, in accordance with the procedures contained in paragraph 9a, below, if cultural resource identification was not previously completed on the property either through the Checklist process or a Phase I environmental site assessment, which included the identification of special resources. The ACHP, or its designee, then has 30 days to respond to the Asset Manager or RTC staff responsible for these properties on the computerized list with a definitive determination.

7. Responsibilities

a. Office Vice Presidents and General Managers are responsible for providing a copy of this directive to all Asset Managers, including Standard Asset Management and Disposition Agreement (SAMDA/SAMA) contractors, interim managers, and RTC staff (Sales Center and Capital Markets personnel).

b. Each Field and Satellite Office is responsible for providing oversight to ensure compliance with the policy and procedures contained in this directive and to ensure that established RTC protocol is followed.

c. RTC Asset Managers and RTC Staff are responsible for implementing the policies and procedures contained herein for applicable RTC assets, and for ensuring that RTC properties containing a cultural resource are submitted to the RTC Special Resources Clearinghouse in accordance with the policy and procedures contained in RTC Circular 10100.40.

d. RTC Environmental Specialists are responsible for ensuring that all Phase I environmental site assessments include the identification of all types of special resources, and that the statements of work for these assessments incorporate the procedures contained in this directive for the identification of cultural resources.

8. Revised Checklist Selection Form and Checklist N

a. General Information. This directive revises the Guidelines' Checklist Selection Form and Checklist N in order to add a check and a question for assets containing a natural area (as previously defined in question number 3 of Checklist K) greater than one acre in size. This review is being implemented to determine whether or not an asset must be submitted to the ACHP for a review for the presence of archeological resources.

b. Action. All Asset Managers and recipients of the Guidelines shall:

(1) Use the revised Checklist Selection Form as contained in Attachment A and the revised Checklist N as contained in Attachment B to this directive.

(2) Remove the Checklist Selection Form from the Guidelines and insert the new Checklist Selection Form as revised (Attachment A), and remove page B-73 of the Guidelines' Checklist N and insert the new pages B-73 and B-73A as revised (Attachment B).

9. Policy and Procedures. The special resources policy contained in RTC Circular 10100.15 is incorporated herein and any

subcontracts to identify the presence of a special resource on assets under the jurisdiction of the RTC, including any costs associated with implementing the ACHP review process, shall be considered as mandatory subcontracts.

a. Contacting the Advisory Council on Historic Preservation

(1) Whenever the result of Checklist N entitled "Archaeological Resources," or Checklist O entitled "Historic Buildings, Structures, Sites and Designated Natural Landmarks," of the Guidelines is Outcome B, or in the case of Checklist O, is Outcome B or C, or the preliminary results of an environmental site assessment indicate that an RTC asset contains either a natural area greater than one acre in size or an improvement 50 years of age or older, the initial agency to be contacted is the ACHP.

(2) The request for the ACHP review will be initiated by the Asset Manager or RTC staff, or their designees, responsible for the management, marketing, or disposition of the asset by using the ACHP Review Form (RTC Form 10100/33) contained in Attachment C to this directive and by sending the request to the address on the form.

(3) The SHPO, or his/her designee, will then provide a response to the Asset Manager or RTC staff within twenty (20) days, with a copy to the appropriate RTC Environmental Specialist.

(4) In all cases, information submitted to the ACHP will include photographs of the site and its improvements (to include all sides of any buildings or other structures), and, for RTC assets with an acre or more of natural area, a U.S. Geological Survey (USGS) map, and an aerial photograph if available, with the property boundaries delineated on it (e.g., a duplication of the USGS map submitted to The Nature Conservancy for an endangered species review in accordance with RTC Circular 10100.15).

b. Responding to the ACHP's Completed Form

(1) Real Property Assets

(a) Cultural Resource(s) Present. Whenever the ACHP, or its designee, advises that a particular property has been identified as having a cultural resource, then the Asset Manager or RTC staff responsible for the property will:

1. review the information and make a determination to add the appropriate special resource code (e.g., "HIST," "ARCH," "SCIN") on the REOMS database;

2. ensure that all Checklists for the particular property are completed in accordance with the Guidelines or, where appropriate, that a Phase I environmental site assessment has been completed and that the assessment includes the identification of special resources in accordance with RTC Memorandum 92-AMSD-0136;

3. immediately notify the RTC Special Resources Clearinghouse in accordance with the policy and procedures contained in RTC Circular 10100.40;

4. ensure that the additional notification requirements contained in paragraph 9c(2), below, are implemented in a timely manner; and

5. place the ACHP report in Section 5 of the six-part property file in accordance with Chapter II, Section D entitled "Management of Asset Files," of RTC Manual 10100.1, with the completed Checklists or environmental site assessment and any other supporting documentation.

(b) No Cultural Resource(s) Present. Whenever the ACHP, or its designee, advises that a particular property does not have a cultural resource, then the Asset Manager or RTC staff responsible for the property will:

1. ensure that all Checklists for the particular property are completed in accordance with the Guidelines or, where appropriate, that a Phase I environmental site assessment has been completed, and that the assessment includes the identification of special resources in accordance with RTC Memorandum 92-AMSD-0136; and

2. place the ACHP report in Section 5 of the six-part property file with the completed Checklists or environmental site assessment and any other supporting documentation.

(c) ACHP Requests Additional Information.

Whenever the ACHP, or its designee, requests additional information for purposes of determining the presence or absence of a cultural resource, then the Asset Manager or RTC staff responsible for the property will:

1. immediately submit additional locational or descriptive information to the ACHP, or its designee, to allow the ACHP to stay within its required response period; and

2. if requested, ensure that the ACHP, or its designee, is provided access to RTC properties for site visits within its required response period.

For archaeological resources, RTC generally will not perform an archaeological survey. Instead, a determination by the SHPO, or his/her designee, will be based on available existing information or a site visit performed by the SHPO, or his/her designee. The RTC Environmental Specialist or Oversight Manager shall follow up with the appropriate Asset Manager or RTC staff to ensure a timely response to any ACHP request.

(d) ACHP Recommends Repair or Maintenance.

Whenever the ACHP, or its designee, recommends emergency repair or maintenance needs to a particular property, including limiting access or securing the site because of the potential for vandalism or arson, the Asset Manager or RTC staff responsible for the property will:

1. review the recommendation and make a determination as to whether or not implementation of the recommendation is in the financial interest of the RTC;

2. amend the asset budget to reflect the cost of immediate repair or maintenance needs, including site security needs; and

3. immediately contract to ensure that emergency repairs or maintenance are conducted, site security

needs are met, or, in the case of a property which is under a sales contract, that the buyer is informed of the ACHP's, or its designee's, recommendations.

If an asset management contractor determines that implementation of a recommendation from the ACHP, or its designee, is not in the financial interest of the RTC, the asset management contractor shall obtain in writing the concurrence of the RTC Oversight Manager responsible for overseeing the asset management contractor.

(e) ACHP Recommends Preservation Measures.

Whenever the ACHP, or its designee, provides a recommendation to preserve the historic character of a particular property, including the recommendation that an historic preservation easement be established, the Asset Manager or RTC staff responsible for the property will implement the recommendation(s) to the extent that such actions, including the establishment of an easement, do not significantly reduce the value of the asset or impede a sale in progress. Easement management and administration shall be assigned to the SHPO or other appropriate governmental entity having easement enforcement authority and a willingness to accept and administer the easement.

(2) Security for Loans. The ACHP agreement will also be used for reviewing property that is security for loans, the results of which can be used in the analysis of foreclosure, loan workout decisions, and evaluation of the viability of land-use assumptions previously used in valuing the asset. Field and Satellite Offices must track the status of non-performing loans for which Checklists or an environmental site assessment have been completed, along with any performing loans that RTC is made aware of as having special resource value.

(3) ACHP and SHPO Contacts. In making any of the determinations outlined in this directive, should there be any questions or clarification required regarding the information in the ACHP's report, the RTC Project Manager listed on the request form contained in Attachment C or the appropriate SHPO should be contacted. Attachment D of this directive contains a list of the names and addresses of the SHPOs.

c. Implementing Notification Requirements. The following notification requirements apply only to real property assets under the jurisdiction of the RTC, as opposed to loans secured by real estate.

(1) Conservation Agencies and Organizations. In accordance with the Guidelines, public and private conservation agencies and organizations shall be notified of real property assets with confirmed special resource values. For identified properties containing cultural resources, the SHPO will notify, within 15 days, interested historic preservation agencies and organizations of which the SHPO or RTC may be aware. The Asset Manager or RTC staff responsible for the property shall immediately provide notification to the RTC Special Resources Clearinghouse in accordance with the policies and procedures contained in RTC Circular 10100.40.

(2) Prospective Purchasers. Advertisements and other marketing materials prepared for real property assets identified as containing a cultural resource will state that a cultural resource is present, and identify the specific resource involved. Asset Managers and RTC staff will inform the prospective purchaser in writing of any RTC property identified as containing a cultural resource, and provide any advertisements and other marketing materials prepared for the property. Asset Managers and RTC staff will also request the prospective purchaser to contact the appropriate governmental agency responsible for administering the cultural resource for advice regarding possible impacts on the future uses of the affected property or possible tax benefits for renovation of an income producing property.

(3) Release of ACHP Form. Upon request, Asset Managers and RTC staff will provide a copy of the ACHP's report upon which the assessment of a cultural resource is based.

10. Forms Availability. The ACHP Review Form contained in Attachment C may be detached and reproduced locally, as needed. This form is also available from Field and Satellite Office Environmental Specialists.

11. Effective Date. This directive is effective immediately.

Attachments

Appendix B: Historic Building Checklist

CHECKLIST O

HISTORIC BUILDINGS, STRUCTURES, AND SITES

Introduction

Historic buildings, structures, and sites can reveal a great deal about human conditions in the past and possibly hold lessons for our lives today. They are irreplaceable repositories of important cultural information that can be destroyed by careless handling. In addition, they are frequently enjoyed by the public either for their beauty or educational value.

Certain significant types of historic resources are protected from activity that may damage their historic value. This damage may occur in obvious ways, such as tearing down an important old building, but also in less obvious ways, such as removing an object so that its relationship to other parts of the historic location is lost, though the object itself is not actually damaged.

Regulatory Context

Preserving historic properties as important reflections of our American heritage became a national policy through passage of the Antiquities Act of 1906, the Historic Sites Act of 1935, and the National Historic Preservation Act of 1966, as amended. These last two laws made the Secretary of the Interior responsible for maintaining a list of properties that are significant in American history, architecture, archaeology, engineering, and culture; and are worthy of preservation. This list is the National Register of Historic Places, and is maintained and expanded by the National Park Service on behalf of the Secretary of the Interior.

An independent Federal agency, the Advisory Council on Historic Preservation, exists to encourage other Federal agencies to consider, and, where feasible, adopt measures that will preserve historic properties that would otherwise be damaged or destroyed. While the Resolution Trust Corporation is not a Federal agency, the process set up by the Council to deal with historic properties, known as the Section 106 process, can be valuable to RTC in determining how to handle any historic properties they may hold. The Council does not have authority to require agencies to halt or abandon planned actions that will affect historic properties; its process emphasizes consultation among lead agencies, the State Historic Preservation Officer (SHPO), and other interested parties to identify and, if possible, to agree upon ways to protect the properties in question.

The Section 106 process applies to properties that have been listed in the National Register of Historic Places, properties that have been determined to be eligible for inclusion in the Register whether or not they are actually listed, and properties that may be eligible for inclusion but have not yet been evaluated. If a property has not yet been nominated to the Register or determined eligible for inclusion, it is the responsibility of the lead agency to determine its eligibility, following the Section 106 process and criteria and rules set out by the National Park Service.

The National Park Service criteria for the National Register of Historic Places are the standards for evaluating the significance of historic properties and are designed as a guide in evaluating potential entries for the Register. To be listed in the Register, a property must contain a building, structure, site, object, or be part of a district that is significant in American history, architecture, archaeology, engineering, and culture and have integrity of location, design, setting, materials, workmanship, feeling, and association. (This can mean that a building has not been dramatically remodeled or been moved.) In addition, a property must also meet one of the following criteria:

- o Association with events that have made a significant contribution to the broad pattern of our history.
- o Association with the lives of persons significant in our past.
- o Representation of the special characteristics of a type, period, or method of construction; or represent the work of a master; or have high artistic values; or be a significant and identifiable group whose individual parts may not have distinction.
- o Source or potential source of information important in prehistory or history.

Many types of properties are generally not considered eligible for the Register, including cemeteries, birthplaces, or graves of historic figures; religious properties; structures that have been moved; reconstructed buildings; commemorative properties; and properties whose historic significance is less than 50 years old. However, these types of properties will qualify for the Register if they are integral parts of districts or if they are of exceptional importance.

CHECKLIST O

HISTORIC BUILDINGS, STRUCTURES, SITES AND
DESIGNATED NATURAL LANDMARKS
(for Initial Screening)

Unlike other checklists, this checklist applies to single family residences.

1. Does this property contain a designated natural landmark (look for plaques, markers, or other indications of landmark status)?

Check One: Yes _____ No _____

If YES, proceed to CHECKLIST OUTCOME, Item C.

If NO, proceed to Question 2.

2. Has this property recently been developed, excavated, mined, graded, or otherwise experienced significant disturbance by human activity over all or nearly all of its area?

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to CHECKLIST OUTCOME, Item A.

If NO or UNKNOWN, proceed to Question 3.

3. Are there any buildings or structures on the property? (A structure includes objects such as bridges or dams, which are created by humans and are permanently located on the property.)

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to Question 4.

If NO or UNKNOWN, proceed to Question 6.

4. Are any buildings or structures older than 50 years?

Check One: Yes _____ No _____ Unknown _____

If YES or UNKNOWN, proceed to CHECKLIST OUTCOME, Item B.

If NO, proceed to Question 5.

5. Are there any buildings or structures less than 50 years old that may be considered exceptionally significant in American history, architecture, archaeology, engineering, or culture

(such as the work of a renowned architect or a structure associated with a very significant individual)?

Check One: Yes _____ No _____ Unknown _____

If YES or UNKNOWN, proceed to CHECKLIST OUTCOME, Item B.

If NO, proceed to Question 6.

6. Could this property be considered a Site (a place where a significant event or pattern of events occurred such as a battlefield or prehistoric settlement) whether or not buildings or structures are present?

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to Question 7.

If NO or UNKNOWN, proceed to Question 9.

7. Did this significant event or pattern of events occur more than 50 years ago?

Check One: Yes _____ No _____ Unknown _____

If YES or UNKNOWN, proceed to CHECKLIST OUTCOME, Item B.

If NO, proceed to Question 8.

8. If this significant event or pattern of events occurred less than 50 years ago, may it be considered exceptionally significant in American history, architecture, archaeology, engineering, or culture?

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to CHECKLIST OUTCOME, Item B.

If NO or UNKNOWN, proceed to Question 9.

9. Could this property be considered part of a District (an area with a significant concentration, association, or connection of sites, buildings, structures, or objects united by past events or development such as a group of buildings and the public square they face)? To be part of a District, the property itself does not necessarily have to have great historical significance if it is strongly related to properties that, as a group, have great significance.

Check One: Yes _____ No _____ Unknown _____

B-77

If YES, proceed to Question 10.

If NO or UNKNOWN, proceed to Question 12.

10. Is the District itself or the historical context that makes the District important more than 50 years old?

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to CHECKLIST OUTCOME, Item B.

If NO or UNKNOWN, proceed to Question 11.

11. If the District itself or the historical context that makes this District important is less than 50 years old, may it be considered exceptionally significant in American history, architecture, archaeology, engineering, or culture?

Check One: Yes _____ No _____ Unknown _____

If YES or UNKNOWN, proceed to CHECKLIST OUTCOME, Item B.

If NO, proceed to CHECKLIST OUTCOME, Item A.

CHECKLIST OUTCOME:

- A. Property is not recommended for further study _____.

There is no evidence or information to indicate that the property is or contains a historic building, structure, or site.

- B. Property is recommended for further study _____.

This site may contain a historic building or structure or may be a historic site. Contact appropriate state or Federal agencies to determine whether the property is protected or registered. See Exhibit F for lists of state and Federal agencies.

- C. Property is recommended for further study _____.

Property contains a designated natural landmark to be included on the RTC property inventory.

Signature of Preparer

Date

Appendix C: Archaeological Checklist

CHECKLIST N

ARCHAEOLOGICAL RESOURCES

Introduction

Archaeological sites are a type of historic property that is difficult for someone who is not trained in archaeology to identify since they typically have no obvious features above ground. These sites usually contain buried evidence of past conditions on earth, although occasionally the evidence is not buried or is only partially buried. Archaeological resources can vary a great deal and may include plant and animal life, human settlements, and evidence of human activity. Fossil remains of plants and animals are one type of evidence of past life that interest archaeologists, as are objects and building foundations. Seemingly ordinary items from the distant past become very significant to modern people trying to understand past cultures.

Archaeological resources are valuable sources of information if uncovered carefully and studied. The value of these resources can be greatly diminished or destroyed if they are not handled correctly since much of the information that can be gathered from them depends on their relative location in the soil and to each other. For this reason, these resources must be identified and protected before land is altered by human intervention such as development.

Since it is not possible to excavate all properties to confirm that no archaeological resources exist, a common method for handling detection focuses on the likelihood that a particular property will contain such resources. The likelihood is judged primarily by two factors: (1) whether any resources have been found nearby, and (2) whether the property possesses certain similarities to land that commonly contains such resources.

Regulatory Context

Archaeological resources are considered historic property and, as such, may be protected as important reflections of our American heritage under the Antiquities Act of 1906, the Historic Sites Act of 1935, and the National Historic Preservation Act of 1966, as amended. These latter two laws made the Secretary of the Interior responsible for maintaining a list of properties that are significant in American history, architecture, archaeology, engineering, and culture, and are worthy of preservation. This list is the National Register of Historic Places, and is maintained and expanded by the National Park Service on behalf of the Secretary of the Interior.

An independent Federal agency, the Advisory Council on Historic Preservation, exists to encourage other Federal agencies to consider and, where feasible, adopt measures that will preserve historic properties that would otherwise be damaged or destroyed. While the Resolution Trust Corporation is not a Federal agency, the process set up by the Council to deal with historic properties, known as the Section 106 process, can be valuable to RTC in determining how to handle any historic properties, including archaeological properties, they may hold. The Council does not have authority to require agencies to halt or abandon planned actions that will affect historic properties; its process emphasizes consultation among lead agencies, the State Historic Preservation Officer (SHPO), and other interested parties to identify and, if possible, to agree upon ways to protect the properties in question.

The Section 106 process applies to properties that have been listed in the National Register of Historic Places, properties that have been determined to be eligible for inclusion in the Register whether or not they are actually listed, and properties that may be eligible for inclusion but have not yet been evaluated. If a property has not yet been nominated to the Register or determined eligible for inclusion, it is the responsibility of the lead agency to determine its eligibility, following the Section 106 process and criteria and rules set out by the National Park Service.

The National Park Service criteria for the National Register of Historic Places are the standards for evaluating the significance of historic properties and serve as a guide in evaluating potential entries for the Register. To be listed in the Register, a property must contain a building, structure, site, object, or be part of a district that is significant in American history, architecture, archaeology, engineering, and culture; and have integrity of location, design, setting, materials, workmanship, feeling, and association. Archaeological resources are almost always classified as sites, although they may be part of districts. Integrity for archaeological resources is generally considered in terms of location. In addition, a property must also meet one of the following criteria:

- o Association with events that have made a significant contribution to the broad pattern of our history.
- o Association with the lives of persons significant in our past.
- o Representation of the special characteristics of a type, period, or method of construction; or represent the work of a master; or have high artistic value; or possess characteristics that signify an identifiable archeological group whose individual parts may not have distinction.

- o Source or potential source of information important in prehistory or history.

In addition to the above considerations, certain types of properties are generally not considered eligible but can qualify if they are of exceptional importance. However, the types of properties to which this exception applies are generally not archaeological sites.

CHECKLIST N

ARCHAEOLOGICAL RESOURCES (for Initial Screening)

This checklist does not apply to single family residences unless a significant environmental issue is known or suspected to be present.

1. Has this property recently been developed, excavated, mined, graded, or otherwise experienced significant disturbance by human activity over all or nearly all of its area?

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to CHECKLIST OUTCOME, Item A.

If NO or UNKNOWN, proceed to Question 2.

2. Is this property covered or nearly covered by buildings and/or pavement (such as parking lots) that are less than 50 years old?

Check One: Yes _____ No _____ Unknown _____

If YES, proceed to CHECKLIST OUTCOME, Item A.

If NO or UNKNOWN, proceed to Question 3.

3. Is this property located in a region known to contain significant fossil collections or remnants of organisms of a past geologic age?

Check One: Yes _____ No _____ Unknown _____

If YES or UNKNOWN, proceed to CHECKLIST OUTCOME, Item B.

If NO, proceed to CHECKLIST OUTCOME, Item A.

CHECKLIST OUTCOME:

- A. Property is not recommended for further study _____.

There is no evidence that the property may contain archaeological resources.

- B. Property is recommended for further study _____.

There is information or evidence that archaeological resources are or may be present on the property. Contact appropriate state and Federal agencies. See Exhibit F for lists of state and Federal agencies.

Signature of Preparer

Date

Appendix D: RTC Environmental Policies (Manual 10100.3)

2.0 RTC ENVIRONMENTAL POLICIES

The following environmental policies have been adopted by RTC. Implementation of these policies enables RTC and RTC representatives to properly manage environmental issues.

- o All real estate owned (REO) and all real estate that is security for non-performing loans should be screened for potential environmental issues.
- o A property's appraisal should be "as-is," i.e., it properly reflects those uses that are restricted under Federal, state, and local wetland and floodplain regulations.
- o RTC's REO inventory shall identify properties with natural, cultural, recreational, or scientific values of special significance.
- o RTC will attempt to notify interested public and private conservation organizations of properties with confirmed special resources.
- o The U.S. Fish and Wildlife Service (FWS) will be provided access to RTC properties with wetlands and critical habitat to inspect the property and to develop recommendations, as appropriate, for the placement of restrictive easements for conservation purposes.
- o RTC will implement FWS recommendations concerning conservation easements for wetlands and critical habitat to the extent that such easements do not significantly reduce the value of the asset or impede any sales in progress.
- o RTC's response to environmental hazard issues (i.e., hazardous and toxic substances and wastes) will be case specific. The options available to RTC are:

Real Estate Owned

1. Disposal of assets at a reduction to market value commensurate with the cost of remediation, with site remediation to be completed by the purchaser. RTC should utilize the appropriate instrument (e.g., contingencies on sales contract or placement of remediation funds in an escrow account) to ensure that remediation is completed by the purchaser to the satisfaction of regulatory authorities. This is the preferred option for REO.
2. Completion of site remediation by RTC and subsequent disposal of the asset at market value. This option could be exercised for assets where remediation must be performed as quickly as possible to prevent contamination of adjacent properties (e.g., pollutants are migrating

or groundwater (33%), and underground storage tanks (23%). An informal survey of environmental issues that confront RTC offices conducted in June 1990 indicates that the percentages reported in the Boelter Study are representative of RTC's experience to date with asbestos and underground storage tanks being the two most prevalent problems encountered. RTC's informal survey also indicated that the most frequently encountered special resources to date were wetlands and cultural/historic resources.

1.4 Purpose of the Guidelines

The purpose of these guidelines is to address: (1) environmental policies; (2) process for identifying environmental issues, classifying and evaluating these issues, and developing RTC's response; (3) data management and reporting; and (4) quality assurance.

offsite). In general, it is not RTC's intent to conduct large-scale remediation projects if other alternatives exist.

3. Case-by-case determination for special problems in consultation with concerned Federal and state agencies.

Non-performing Loans

1. Determination to foreclose on a non-performing loan that is secured by real estate (if appropriate under all RTC policies) if site remediation costs are less than the market value of the asset. If foreclosure is completed, RTC would proceed with one of the three response options developed for REO.
2. Determination not to foreclose on a non-performing loan that is secured by real estate if site remediation costs are approximately equal to or exceed the market value of the asset. Therefore, RTC may limit financial and legal obligations associated with an environmental hazard and site remediation.

The recommended option (listed above) will be documented in a case memorandum and be approved by the appropriate delegated authority.

Appendix E: Sample pages from Special Resources Clearinghouse (Nov. 1993)

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OK

As of: November 11, 1993

Special Resource Properties Listing

Property Name Street Address City State Zip	Property Type Contact Company Phone	Property Attributes	List Price Acres of Land Yr. Built	Total Sq Ft	Property Nr Market Status
LAURANN SUBDIVISION HWY 69 PRYOR OK 74361	UNDEVELOPED LAND NORTHCORP REALTY (214) 692-6892	WETL ENSP FLPL	\$22,500 80		943421918 INAC
MINSHALL PARK VI S. FULTON AVE BTWN 77TH & 78TH TULSA OK	RESIDENTIAL LOTS ONTRA, INC (512) 478-9455	ENSP	69.93		923428651 PEND
RIVERBRIDGE 71ST & PEORIA TULSA OK 74136	VACANT LAND META (305) 579-4755	WETL ENSP	4.4893		870593969 AVAI
LOCKE/MCMILLIAN SUNRISE ESTATES TUTTLE OK 73089	UNIMPROVED RESIDENTIAL THE ONTRA COMPANY (512) 478-9455	FLPL			694645031 INIT
REMOTE STORE HWY. 42 REMOTE OR 59670	COMM - RETAIL KANSAS CITY FIELD OFFICE (800) 822-7355	HIST RECR AQUI RIVE	3.54 1924	3,199	2014903 INAC
39 WEST MAIN ST. 39 WEST MAIN STREET LANSDALE PA 19446	BUILDING-COMMERCIAL MIDLAND LOAN SERVICES, L.P. (816) 435-3600	HIST	\$320,000 0.31	15,014	137566137 AUCT
39 WEST MAIN STREET 39 MAIN ST. LANSDALE PA 19446	SINGLE FAMILY SUBDIVISIONS MIDLAND LOAN SERVICES, L. P. (908) 412-9100	WETL ENSP	68.93		137566137 INIT
EMERALD LAKE ESTATES - UNIT 73 EMERALD LAKE ESTATES LONG POND PA 18334	LAND - RESIDENTIAL DEVELOPED MIDLAND ASSET MANAGEMENT, INC. (816) 435-3629	WETL AQUI	\$19,200 1		528926202 PEND
317 7TH AVE 317 SEVENTH AVE NEW BRIGHTON PA 15066	RES SINGLE FAM DET. 1 FAM UNIT VEREX MORTGAGE CORPORATION (608) 257-2527	HIST	\$19,000 0.09		587819131 AVAI
413 SPRUCE STREET, #2 SPRUCE STREET PHILADELPHIA PA 19103	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP. (608) 257-2527	HIST	\$64,000 1890	790	766612902 AVAI

Special Resource Properties Listing

Property Name Street Address City State Zip	Property Type Contact Company Phone	Property Attributes	List Price Acres of Land Yr. Built	Total Sq Ft	Property Nr Market Status
413 SPRUCE STREET, #4 SPRUCE STREET PHILADELPHIA PA 19103	SINGLE FAMILY ATTACHED-CONDOMINIUM VEREX MORTGAGE CORP (608) 257-2527	HIST	\$69,900 1890	1,188	542330554 AVAI
GREEN STREET, #1 2231-1 GREEN STREET PHILADELPHIA PA 19130	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP. (608) 257-2527	HIST	\$84,900 1810	1,296	437530462 AVAI
GREEN STREET, #4 2231-4 GREEN STREET PHILADELPHIA PA 19130	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP. (608) 257-2527	HIST	\$79,900 1810	1,296	280066526 AVAI
MT. VERNON, #1 2006 MOUNT VERNON PHILADELPHIA PA 19130	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP (608) 257-2527	HIST	\$99,500 1880	2,382	709738364 PEND
MT. VERNON, #2 2006 MT. VERNON, #2 PHILADELPHIA PA 19130	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP (608) 257-2527	HIST	\$99,500 1880	2,150	375239301 PEND
PENNSYLVANIA BUILDING 1500 CHESTNUT STREET PHILADELPHIA PA 19102	COMMERCIAL BUILDING HOME FEDERAL SAVINGS BANK (619) 699-7314	HIST	0.25 1923	200,000	744177633 AVAI
SPRUCE STREET, #1 413 SPRUCE STREET PHILADELPHIA PA 19103	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP (608) 257-2527	HIST	\$89,900 1890	1,542	692126803 PEND
SPRUCE STREET, #3 413 SPRUCE STREET, #3 PHILADELPHIA PA 19103	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP (608) 257-2527	HIST	\$71,900 1890	1,270	106533612 PEND
SPRUCE STREET, #5 413 SPRUCE STREET, #5 PHILADELPHIA PA 19103	RESIDENTIAL-CONDOMINIUM VEREX MORTGAGE CORP (608) 257-2527	HIST	\$49,900 1890	594	578819899 AVAI
2117 LOWRIE STREET 2117 LOWRIE ST PITTSBURGH PA 15215	RES SINGLE FAM DET. 2 FAM UNIT VEREX MORTGAGE CORPORATION (608) 257-2527	HIST	\$28,800 1900	824	740837593 PEND

Appendix F:

Addendum and April 22, 1994, Dr. Pepper case ruling

On April 22, 1994, after the final draft of this thesis was completed, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in the case affecting the disposition of the Dr. Pepper Headquarters Building in Dallas, Texas.

As noted in Chapter 7 which deals with the case, the National Trust, in partnership with local preservation organizations, had filed suit because the FDIC had not followed NHPA Section 106 guidelines and was preparing to sell this National Register-eligible property to a buyer who intended to demolish it. In its ruling, the appellate court affirmed the judgment of the district court which had dismissed the suit for lack of jurisdiction. The Court of Appeals agreed that courts are barred by statute from restraining or affecting the FDIC in the exercise of its powers or functions as a conservator or receiver.

The case is considered a blow to preservation organizations who had hoped it would create a precedent for FDIC compliance with NHPA. The court's opinion is attached.

Post-It® brand fax transmittal memo 7671		# of pages
To: Josh Bloom	From: Alex Acosta	
cc: Edw. Craig Hain	cc: National Trust	
Dept.	Phone #	
Fax # 201/761-4353	Fax #	

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 25, 1994

Decided April 22, 1994

No. 93-5137

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE
UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC.,
A NON-PROFIT CORPORATION; PRESERVATION TEXAS, INC.,
A NON-PROFIT CORPORATION,
APPELLANTS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION;
ANDREW C. HOVE, JR., IN HIS OFFICIAL
CAPACITY AS ACTING CHAIRMAN, FEDERAL
DEPOSIT INSURANCE CORPORATION,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(93cv00904)

Bills of costs must be filed within 14 days after entry of judgment.
The court looks with disfavor upon motions to file bills of costs out
of time.

Richard B. Nettler argued the cause for appellants. With him on the briefs were David A. Doherty, Elizabeth S. Merritt and Andrea C. Fenster.

Jerome A. Madden, Counsel, Federal Deposit Insurance Corporation, argued the cause for appellees. With him on the brief were Ann S. DuRoss, Assistant General Counsel, and Richard J. Osterman, Jr., Senior Counsel, Federal Deposit Insurance Corporation.

Kirk Kelso Van Tine and P. Matthew Sukko entered appearances for *amicus curiae* Resolution Trust Corporation.

Stuart W. Bowen, Jr. entered an appearance for *amicus curiae* Texas Historical Commission.

Before: WALD, SILBERMAN, and RANDOLPH, Circuit Judges.

Opinion PER CURIAM.

Concurring opinion filed by Circuit Judge WALD in which Circuit Judge SILBERMAN joins.

Concurring opinion filed by Circuit Judge RANDOLPH.

PER CURIAM: Upon consideration of the briefs and oral argument on rehearing, the original panel opinion, reported as *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238 (D.C. Cir. 1993), is ordered reinstated, except for the analysis of *South Carolina v. Regan*, 465 U.S. 367 (1984), contained in footnote one, which is now controlled by Judge Wald's concurrence.

The original panel held that 12 U.S.C. § 1821(j), which bars courts from restraining or affecting the FDIC in the exercise of its powers or functions as a conservator or receiver, applied in this case as a result of 12 U.S.C. § 1823(d)(3)(A). 995 F.2d at 240. Section 1823(d)(3)(A) provides: "With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title." Short-

ly after our opinion issued, the Fifth Circuit, in a somewhat different factual setting, permitted an injunction action against the FDIC to go forward. *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545 (5th Cir. 1993). Nothing said in *Sierra Club* persuades us to alter the panel's original decision.

There is no question that the "rights, powers, privileges, and authorities" granted the FDIC under § 1821 devolve upon it when it acquires assets or assumes liabilities pursuant to § 1823. In *Sierra Club*, however, the Fifth Circuit expressed doubts about whether the FDIC had acted under § 1823, or under some other provision. 992 F.2d at 549-50. Whatever may have been the situation there, in this case there is no doubt that the FDIC acquired the Dr. Pepper Headquarters Building pursuant to § 1823, as our original opinion recognized. 995 F.2d at 240. Appellants do not contend otherwise.

The Fifth Circuit also believed that § 1823(d)(3)(A) did not "clearly and unambiguously" give "the FDIC the 'privilege' to be free of the court's equity jurisdiction." 992 F.2d at 550. The court offered no explanation for this conclusion and we do not agree with it. Our original opinion concluded that the FDIC's immunity from judicial restraint is among the "rights, powers, privileges, and authorities" (§ 1823(d)(3)(A)) contained in § 1821. 995 F.2d at 240. It is in that category for two reasons. First, it is set forth in a subsection of § 1821, that is, in § 1821(j). Second, the FDIC's immunity from judicial restraint, like the FDIC's exemption from state taxation and the immunity of its property from levy, attachment or garnishment, which § 1823(d)(3)(A) also bestows on the FDIC through its reference to § 1825(b), is among the FDIC's "rights, powers, privileges, and authorities" when it is acting as a receiver. It is no answer to say, as appellants do, that § 1821(j) merely "operates as a limitation on the rights of third parties to obtain injunctive or equitable relief against the FDIC." Brief for Appellants at 16. By so limiting the powers, rights and privileges of third parties, § 1821(j) increased the rights, privileges and powers of the FDIC. To take away one person's "right" to sue another is to give the other the "right" not to be sued. The court in *Sierra Club*, 992 F.2d at 550, thought it significant that § 1823(d)(3)(A)

"does not speak directly to the equitable jurisdiction of the federal courts." We attach no importance to this. The provision is specific enough—every § 1821 right, power, privilege or authority of the FDIC as receiver is included. Section 1823(d)(3)(A)'s reference to § 1821 necessarily encompasses § 1821(j). Inclusion by reference is a time-honored drafting technique, without which federal statutes would become even more unwieldy than they already are.¹

It is worth adding that, even apart from statutory language, the line drawn in *Sierra Club* raises problems. The FDIC is authorized to operate in the capacity of a corporate insurer under § 1823, see *FDIC v. Nichols*, 885 F.2d 633, 636 (9th Cir. 1989), and in the capacity of a receiver for failed financial institutions under § 1821, see 12 U.S.C. § 1821(c)(2) & (3). The FDIC has discretion regarding whether it will wear one hat or the other, or both. To hold, as the Fifth Circuit did, that when the FDIC acts in its corporate capacity, § 1823(d)(3)(A) does not insulate it from judicial restraint pursuant to § 1821(j), is to create an incentive for the FDIC to act as receiver in order to avoid the consequences of litigation and delay. Such a system would make little sense. The FDIC's charge is to maximize the value of the failed

¹ *Abbott Bldg. Corp. v. United States*, 951 F.2d 191 (9th Cir. 1991), construed 12 U.S.C. § 1464(d)(6)(C) (1988), which protects the Federal Savings and Loan Insurance Corporation (FSLIC) against judicial restraint when it acts as a receiver, much in the same way and with the same language as § 1821(j) protects the FDIC. The FSLIC, acting as a receiver, purchased plaintiff's property with a credit bid at a foreclosure sale held under state law. Plaintiff, claiming that the sale was not conducted in accordance with state law, sued to set the sale aside. The court held that the suit did not seek to "restrain or affect" the FSLIC's powers as a receiver, but "simply leaves the determination of third party rights in the hands of others." 951 F.2d at 196. The court limited its holding to situations in which the FSLIC, acting as a receiver, had acquired property in an invalid foreclosure sale. *Id.* The court added that the statute would still immunize the FSLIC from claims that it had acted in an "improper manner." Given the limited scope of this holding, in a situation far removed from this case, we see no need to discuss whether we agree with it.

institution's assets and it should be free to decide whether this is best accomplished if it acts as a receiver or in its corporate capacity or both.²

The judgment of the district court dismissing the suit for lack of jurisdiction is affirmed for the reasons stated in the original panel opinion and for the reasons stated above.

² *California v. Grace Brethren Church*, 457 U.S. 393 (1982), forecloses appellants' argument that § 1821(j) does not bar its suit to the extent it is seeking a declaratory judgment rather than an injunction. There is, the Court ruled, so "little practical difference between injunctive and declaratory relief" that a statute barring injunctions will also have the effect of barring declaratory judgments. 457 U.S. at 408-09; see also *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1986).

WALD, *Circuit Judge*, with whom SILBERMAN, *Circuit Judge*, joins, concurring: With the benefit of full briefing and argument, I now agree with the result and the basic reasoning of the reinstated panel opinion on the construction of 12 U.S.C. § 1821(j) and its application to the FDIC in its corporate capacity via 12 U.S.C. § 1823(d)(3)(A). That plenary treatment allows us to decide this important case of first impression in our circuit with the necessary confidence which I, for one, did not have months ago when forced to a decision "in barely over a week on an *unargued* stay motion." *National Trust for Historic Preservation in the United States v. FDIC*, 995 F.2d 238, 244 (D.C. Cir. 1993) (Wald, J., dissenting). I was concerned then—I believe justifiably—about "potentially immunizing an agency from court enforcement of the entire U.S. Code," a result which I thought warranted an in-depth review of the statute, its structure, purpose and history. It seemed counter-intuitive that the FDIC, acting in its receiver capacity, could "operat[e] a factory or even a hazardous waste facility in a manner that was causing serious health or environmental damage and that allegedly violated the Clean Water Act or the Occupational Safety and Health Act[, and] court[s] would be] powerless to take any action ... to restrain or affect' that operation, unless the FDIC 'has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions.'" *Id.* at 244 (Wald, J., dissenting) (quoting panel majority, *id.* at 240). Indeed, even more horrendous hypotheticals could be constructed. Would the courts be powerless if the FDIC chose to sell crack cocaine in an effort to liquidate assets discovered in an unclaimed safety deposit box of a failed bank? It is of course by the use of such unlikely scenarios that judges test the integrity and inevitability of "plain meaning" interpretations.

While after further study and reflection I agree with the original panel majority that the language of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections in the United States Code), supports its construction, the result is sufficiently "odd" so as to oblige

us to "search for other evidence of congressional intent to lend the term its proper scope." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)). For example, in *South Carolina v. Regan*, 465 U.S. 367 (1984), the Supreme Court considered a similarly sweeping limitation on court action appearing in the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a): "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." In *Regan*, the Court turned to the Tax Anti-Injunction Act's legislative history, despite the fact that the Act's language "could scarcely be more explicit," *Bob Jones Univ. v. Simon*, 416 U.S. 726, 736 (1974). The legislative history discussed in *Regan* by no means abounded with detailed revelations of congressional intent, but the Court nonetheless concluded from it that the Act's "purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 465 U.S. at 378 (footnote omitted). See also *id.* at 373-74, 377.

I don't agree with the suggestion by the original panel majority that the *Regan* Court's recourse to legislative history as a means of narrowing the scope of an otherwise improbably broad statute was confined to the "unique context" of tax collection or "Supreme Court doctrine that otherwise insulates the tax collector against suits that would deflect the collector's energies from the collection of taxes." *National Trust*, 995 F.2d at 239 n.1. To the contrary, the special governmental interest in insulating the tax collector from suits would argue *against* consulting legislative history to insure there was not a contrary interpretation that would reduce the tax collector's protection from court action in apparent contradiction to the statute's plain meaning. Nonetheless, my own research—and counsels'—has uncovered no evidence in this case that § 1821(j) was passed in the "context of a statutory scheme that provided an alternative remedy."

Regan, 465 U.S. at 373, for any and all misfeasance by the liquidating agency, or otherwise bars only actions brought by parties who have access to an alternative remedy against the agency.

Therefore, I am compelled to conclude that § 1821(j) does indeed bar courts from "restrain[ing] or affect[ing] the exercise of powers or functions of the [FDIC] as a conservator or a receiver," 12 U.S.C. § 1821(j), unless it "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions," *National Trust*, 995 F.2d at 240. Congress undoubtedly did not contemplate anything like the parade of possible violations of existing laws—civil and criminal—that creative judges can conjure up, but given the breadth of the statutory language, untempered by any persuasive legislative history pointing in a different direction, the statute would appear to bar a court from acting in virtually all circumstances. I am somewhat assuaged by the fact, described at oral argument and in the briefs, that a private person genuinely aggrieved by such unlawful FDIC action could generally bring a suit for damages, or seek administrative redress through the § 1821(d) monetary claims procedure which ultimately includes judicial review. See *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 399-400 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991) ("the effect of [§ 1821(j)] in this case is solely to prevent a particular remedy ... [and] does not deprive plaintiffs, if wronged, of any other remedy that would not 'restrain or affect the exercise of the receiver's or conservator's powers or functions'"). And, of course, we do not decide today what might happen if the denial of an injunction in any particular situation itself violated constitutional due process. Cf. *Regan*, 465 U.S. at 375; id. at 393-94 (O'Connor, J., concurring in judgment).

Thus, it would seem that the instant situation in which the FDIC is alleged to have violated sections 106 and 110(a) of the National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2(a), is the exception rather than the rule. Without jurisdiction, we cannot express any opinion on whether the FDIC is statutorily compelled to consult with the Advisory

Council before selling for demolition structures like the Dr. Pepper building which is "considered one of the finest examples of Art Moderne architecture in Texas." *National Trust*, 995 F.2d at 241 (Wald, J., dissenting). See *California v. Grace Brethren Church*, 457 U.S. 393, 408-11 (1982) (holding declaratory judgment generally barred whenever injunction is prohibited). Congress, of course, can change this state of affairs should it so choose.

RANDOLPH, *Circuit Judge*, concurring: I continue to believe footnote one of the original panel opinion, 995 F.2d at 239 n.1, properly describes and distinguishes *South Carolina v. Regan*, 465 U.S. 367 (1984).

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